

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

132

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,717

WILLIAM J. HEWITT,

Appellant,

v.

SAFEWAY STORES, INC.,

Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 13 1967

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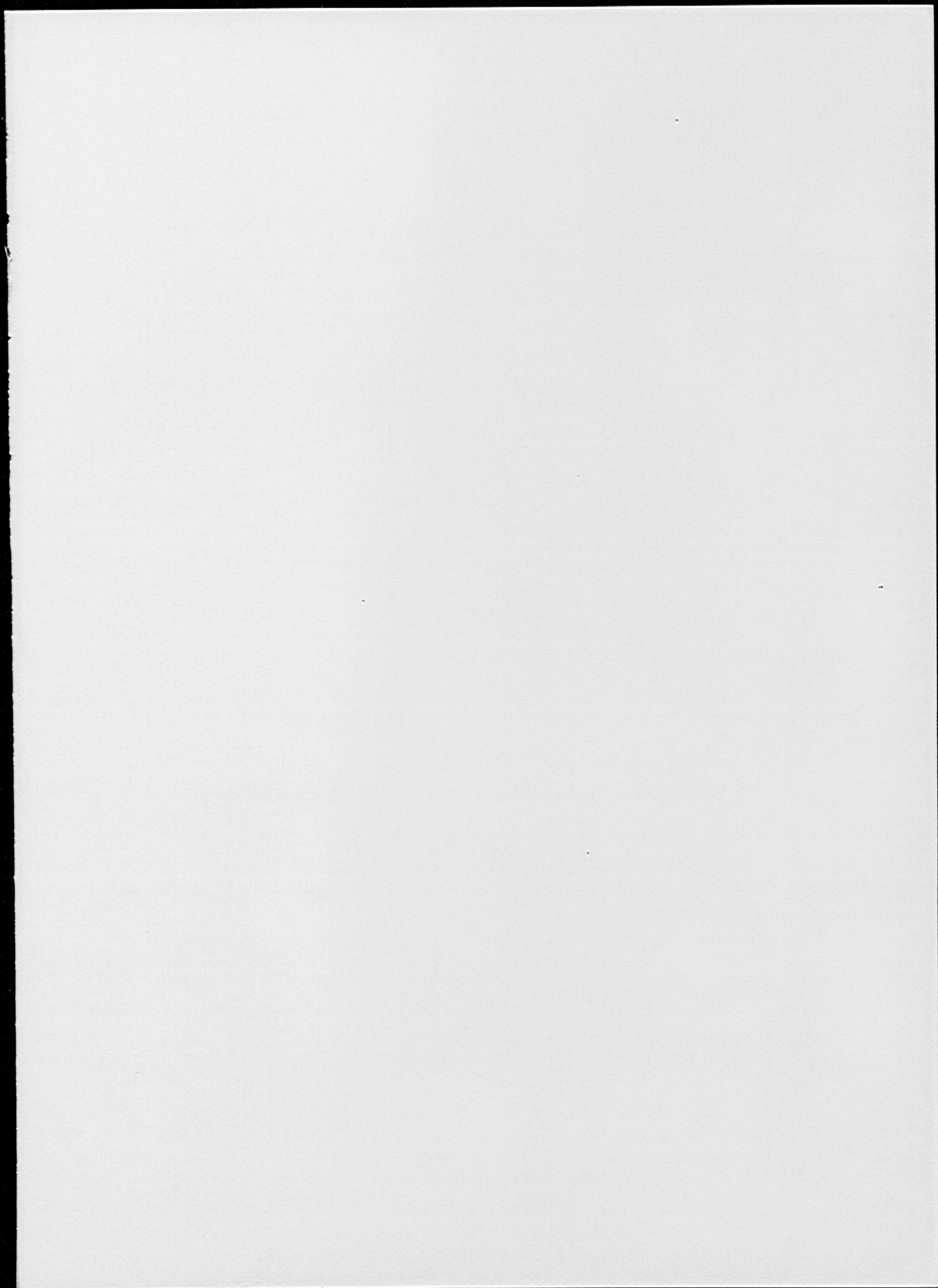
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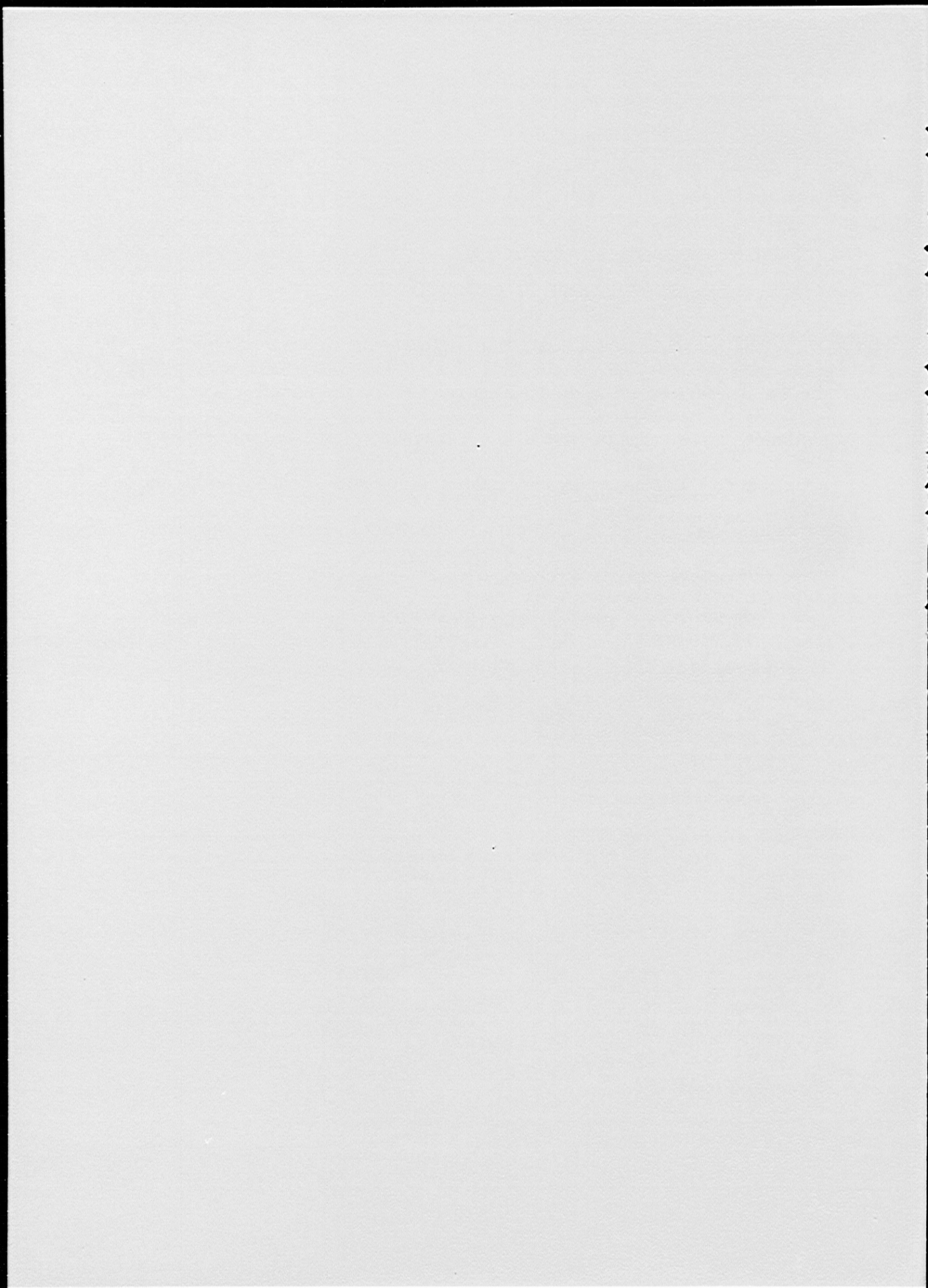
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(i)

STATEMENT OF QUESTION PRESENTED

The question is whether, in a negligence action for personal injury, the Trial Court erred in directing a verdict for the appellee where the evidence showed that the use of the warehouse platform from which the appellant fell was owned by and under the absolute control and direction of the appellee; in refusing to permit appellant to introduce testimony from two safety experts when appellee could show no prejudice by the admission of their testimony; and in refusing to permit evidence of changes made in the use of the platform.



INDEX

	<u>Page</u>
STATEMENT OF QUESTION PRESENTED	i
JURISDICTIONAL STATEMENT	1
STATEMENT OF CASE	2
STATEMENT OF POINTS	5
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. Reference to Original Complaint in Appellee's Opening Statement Ground for Mistrial	7
II. The Refusal of the Trial Court to Permit Testimony of Expert Wit- nesses Greatly Prejudiced Appel- lant's Case	8
III. Reasonable Men Could Have Concluded that the Appellee's Rules Governing the Use of the Loading Platform Created an Unsafe Place to Work	11
IV. Changes in Use of Loading Platform Admissible to Show Control	21
CONCLUSION	22

TABLE OF CASES

Ackerhalt v. National Savings & Trust Co., 100 App. D. C. 312	21
Baer Brothers, Inc. v. Keller, 208 Md. 556, 119 A.2d 410	21
Blackwell v. Regal Cab Co., 114 App. D. C. 397	11
Borger v. Conner, 210 A.2d 546	11

	<u>Page</u>
Bull S.S. Line v. Fisher, 196 Md. 519, 77 A.2d 142 (1950)	14, 15
Burke v. Williams, 244 Md. 154, 223 A.2d 187 (1966)	19
Campbell v. Jenifer, 222 Md. 106, 110, 159 A.2d 353	21
Capital Transit Co. v. Webb, 79 App. D. C. 58, 142 F.2d 757	11
Coca Cola Bottling Works, Inc. v. Hunter, 95 App. D. C. 83	21
Dilley v. Baltimore Transit Co., 183 Md. 557, 39 A.2d 469, 155 A.L.R. 627	21
Dougherty v. Chas. H. Tompkins Co., 99 U. S. App. D. C. 348, 240 F.2d 34 (1957)	20
Grober v. Capital Transit Co., 119 F. Supp. 100	11
Hess v. Bernheimer & Swartz, Pilsener Brewing Co., 219 N. Y. 415, 114 N. E. 808	18
International Standard Electric Corp., v. Kingsland, 83 App. D. C. 355, 169 F.2d 890	11
Johnson v. Geffen, 111 App. D. C. 1	10
Kenney v. Washington Properties, 76 App. D. C. 43, 128 F.2d 612	11
Le Vonas v. Acme Paper Board Co., 184 Md. 16, 40 A.2d 43	17, 19
Meadow Gold Products v. Wright, 278 F.2d 867	10
Peoples Drug Stores, Inc. v. Windham, 117 Md. 172, 12 A.2d 532 (1940)	12, 13
Potomac Edison Co. v. State, for Use of Hoffman, 168 Md. 156, 161, 177 A. 163, 166	18

(v)

	<u>Page</u>
Schirra v. Delaware L. & W.R. Co., 103 F. Supp. 812 (D.C. Md. Pa. 1952)	19
Sears v. Baltimore & Ohio Railroad, 219 Md. 118, 148 A.2d 366	21
Smith v. Benick, 87 Md. 610, 614, 41 A. 56, 42 L.R.A. 277	18
State, to Use of Bowman v. Wooleyhan Transp. Co., 192 Md. 686, 65 A.2d 321	21
Sun Cab Co., Inc. v. Cialkowski, 217 Md. 253, 142 A.2d 587	21
Warner v. Synnes, 114 Or. 451, 230 P. 362, 235 P. 305, 44 A.L.R. 904	18
Weilbacher v. J. W. Putts Co., 123 Md. 249, 256, 91 A. 343, Ann. Cas. 1916C, 115	18
Williamson Truck Lines, Inc. v. Benjamin, 222 A.2d 375	15, 16



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Appellant,

v.

SAFEWAY STORES, INC.,

Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an action seeking damages in excess of \$10,000 for injuries sustained by William J. Hewitt. The United States District Court for the District of Columbia took jurisdiction over this case pursuant to Title 11,

Section 11-306 of the District of Columbia Code (1961). At the close of all of the evidence, the Trial Court granted a motion for a directed verdict in favor of the defendant (appellee). This Court has jurisdiction over this appeal under Title 28, U.S.C., Section 1291.

STATEMENT OF CASE

This is a case involving the fall of a truck driver from a warehouse loading platform.

On January 10, 1959, William Joseph Hewitt, the appellant, was employed by the Atlantic Box and Basket Company (J.A. 49; Tr. 119). His employment involved going to warehouses with a truck to pick up orders for his employer (J.A. 50; Tr. 120). On the date mentioned above Mr. Hewitt drove a 1956 or 1957 International truck to the salvage warehouse of the appellee, Landover, Maryland. His instructions were to pick up a load of empty egg cartons (J.A. 50; Tr. 121). On this date his helper was Joseph Bailey (J.A. 51; Tr. 122).

The truck used was a ton and a half or two ton stake body truck. The width of the body of the truck was between six and a half to seven feet wide (J.A. 51; Tr. 123). When the tailgate of the truck was down it was three feet off the ground (J.A. 53; Tr. 124). The truck was backed up to the platform. The tailgate was down, secured by two chains, one on each end (J.A. 52; Tr. 125). The distance from the tailgate to the platform was approximately one foot (J.A. 52; Tr. 124). The warehouse loading platform was 12 feet deep and four feet high.

On the date indicated there were pallets placed on the platform. One pallet was standing on end and others placed flat on the platform against the upright pallet (J.A. 54, 55; Tr. 130, 134). (Exhibits A, B, C) The pallets were three feet by four feet.

After having arrived at the warehouse Mr. Hewitt went to Mr. Koerner, the man in charge of the warehouse, and told him that they were there to get a load of empty egg cartons (J.A. 55; Tr. 135).

Mr. Koerner instructed his man to wait on Mr. Hewitt and his helper. A pallet of egg cartons was brought out of the warehouse by an employee of the appellee (J.A. 55, 85, 89, 94; Tr. 135, 249, 259, 276). The pallet was then placed as close to the outside edge of the platform as possible, directly behind the truck as near to the center of the body of the truck as possible (J.A. 55, 56, 85, 89; Tr. 135, 249, 259).

The egg cartons extended over the sides of the pallet some three to six inches on each end (J.A. 56; Tr. 136). The egg cartons were piled six high. There was about ten to twelve inches' clearance between the end of the pallet and the side of the truck when the pallets were being unloaded from the platform to the truck (J.A. 58; Tr. 139).

Mr. Hewitt further testified that he could not work in the aisle because Mr. Koerner's instructions were to keep the aisle open at all times (J.A. 59, 84, 88, 89, 101; Tr. 140, 248, 257, 258, 319). Forklifts were coming back and forth through the aisle. If the aisle was not open, he (Koerner) would stop the man from loading (J.A. 59; Tr. 140).

Mr. Hewitt stated that he picked up two crates and walked around the corner, which was very close, and as he stepped between the pallet and down on the truck, he fell off the edge. He testified he had very little room to walk and be safe (J.A. 58, 59, 60, 61, 62; Tr. 140, 141, 142, 145, 146).

At the time of the appellant's fall, trucks were being loaded and unloaded next to the truck he was working from and lined up all along the platform (J.A. 59, 60, 103; Tr. 142, 328).

Mr. Hewitt testified further that he had fallen off the platform once before and that he had seen several other workers jump off the platform out of the way of the pallets that were being moved (J.A. 61; Tr. 145).

Mr. John J. Knight, appellee's office manager, testified that the warehouse was under Safeway's control and that it had authority to decide what use to make of the warehouse and the platform (J.A. 79, 80; Tr. 228, 229, 230, 231, 232).

There was testimony from Mr. Ray J. Best, the shipping and receiving clerk at the warehouse, that Safeway had complete control over the platform. This control included deciding what was to be placed on the platform (J.A. 85, 86; Tr. 250).

After his fall, the appellant was taken to the hospital and it was determined that he had a severely comminuted fracture of the leg. Complications developed requiring twenty-six surgical procedures and a hospitalization for a total of more than two years. The appellant is permanently and totally disabled from any type of employment (J.A. 45, 46, 81; Tr. 78, 82, 234).

At the beginning of the trial and during the course of the trial, the appellant attempted to introduce testimony from expert witnesses on the safety features and architectural design of the platform. The Trial Court refused to permit testimony from the experts (J.A. 21-28; Tr. 3-21).

At the close of the appellee's case, the appellee made a motion for a directed verdict which was granted. The Trial Court ruled that there existed a jury question on the issue of negligence and contributory negligence. The Court stated, however, that the appellant assumed the risk of his fall and as a matter of law could not recover (J.A. 108; Tr. 383).

Appellant filed a motion for a new trial. The motion was denied and this appeal followed.

STATEMENT OF POINTS

1. The Trial Court erred in failing to declare a mistrial at the conclusion of the appellee's opening statement.
2. The Trial Court erred in refusing to permit the appellant to introduce evidence from two expert witnesses, *i.e.*, the safety engineer and an architect, on the issue of the unsafe condition of the platform.
3. The Trial Court erred in refusing to permit evidence of changes made in the platform following the appellant's injury.
4. The Trial Court erred in directing a verdict in favor of the appellee on the ground of the assumption of risk.

SUMMARY OF ARGUMENT

This case was decided by the Trial Court at the close of all of the evidence. The appellant's allegations of negligence are based on the theory that the appellee failed to supply him with a safe place to work. It was undisputed during the course of the trial that the warehouse platform from which the appellant fell was owned by, and under the exclusive control of, the appellee, Safeway Stores.

Prior to the start of the trial on this action the appellant, through counsel, notified counsel for the appellee of the names of expert witnesses he intended to call during the course of the trial. At the start of the trial the appellant indicated to the Court that he had the names of expert witnesses not included in the witnesses listed in accordance with the pretrial order. The appellee strongly objected to the use of these witnesses at that stage of the proceedings. However, the appellee at no time was able to show that it would be prejudiced by the testimony of the experts. The Trial Court ruled that the experts' testimony could not be introduced by the appellant for the reason that their

admission at that time would further delay the trial. It is the contention of the appellant that under the circumstances of this case the mere fact that the trial may have been delayed was not sufficient reason to refuse to allow the experts to testify. Such a refusal greatly prejudiced the appellant's case and deprived him of an opportunity to fully develop his theories of negligence.

In its opening statement the appellee informed the jury and the Court that the appellant's original complaint alleged that a hand truck forced the plaintiff (appellant) off the edge of the platform. The appellee then indicated that the appellant changed his theory of negligence and was then pursuing a different theory. This statement was improper and should have been the ground for a mistrial. The reference by the appellee to the appellant's original theory of negligence could have prejudiced the Court and ultimately led to its decision to grant the motion for a directed verdict.

Since the use of the platform by the appellee was an important issue to be resolved in determining responsibility for the appellant's fall, the Trial Court further erred in refusing to permit him to introduce evidence of changes made in the use of the platform after this accident. The appellee alone had the right, by virtue of ownership and control, to remove stored pallets from the platform. After appellant's accident the manner in which pallets were stored on the platform was changed. This fact, excluded by the Court, was important to further support the appellant's allegations of negligence against the appellee.

At the conclusion of all of the evidence the Trial Court granted appellee's motion for a directed verdict. In so ruling the Trial Judge stated that it was his opinion that a jury issue had been raised on the question of negligence and contributory negligence. The Court ruled, however, as a matter of law that the appellant assumed the risk of his injury and was therefore barred from recovery. The evidence clearly

showed that the unsafe condition was created by the appellee. In ruling that the appellant was not entitled to recovery as a matter of law, the Court in effect said that the only alternative left to the appellant was to give up his job. The appellant was compelled to accept the conditions laid down by the appellee or not work there at all. The appellant contends that this issue should have been decided by the jury. Whether the appellant voluntarily exposed himself to a known danger is a question that should have been left to the jury to decide. Especially is this true when it was clearly shown that the appellee had a duty to protect the appellant from the risk.

Accordingly, this Court should reverse the Trial Court's granting of the motion for a directed verdict and permit the appellant to have his case decided by a jury.

ARGUMENT

I

REFERENCE TO ORIGINAL COMPLAINT IN APPELLEE'S OPENING STATEMENT GROUND FOR MISTRIAL

During the course of the appellee's opening statement, counsel for the appellee informed the jury that the appellant's original complaint alleged that a hand truck or dolly forced the appellant off the edge of the platform. The counsel for the appellee then indicated that the appellant had changed the theory of negligence and was now pursuing a theory of improper design of the platform and that the appellee failed to provide the appellant with a reasonably safe place to work.

At the close of the appellee's opening statement, the appellant moved for a mistrial for the reason that the remarks of counsel for the appellee concerning the original complaint were not a proper subject for an opening statement, and for the further reason that the

original complaint could not be introduced into evidence since it had been amended and was thus no longer the basis for the appellant's action against the appellee. The Trial Court denied the appellant's motion for a mistrial.

On the second day of trial during the course of the appellant's case in chief, the Court decided that the original complaint could not be introduced or exhibited to the jury during the course of the trial. The appellant strongly urges that the error had been committed and that his remedy, because of statements made by counsel for the appellee in the opening statement, should have been the granting of a mistrial at that point.

At the time of amendment of the original complaint, the appellant relied on Rule 15 of the Federal Rules of Civil Procedure. Once the complaint was amended by the permission of the Court, the amended complaint controlled all subsequent proceedings from then on, including the pretrial and trial. The failure of the Trial Court to grant a new trial for the reasons mentioned above was erroneous, and the appellant respectfully submits that he is entitled to a new trial for that reason alone.

II

THE REFUSAL OF THE TRIAL COURT TO PERMIT TESTIMONY OF EXPERT WITNESSES GREATLY PREJUDICED APPELLANT'S CASE

At the time of the pretrial on July 3, 1963 the parties agreed to file with the Clerk of the Court and to mutually exchange on or before September 3, 1963 a list of the names and addresses of all witnesses known to them. In accordance with the pretrial order, the appellant by letter dated July 17, 1963, addressed to the counsel for the appellee, advised the appellee of the names and addresses of all witnesses

"known to him." On October 4, 1966, the appellant first became aware of two expert witnesses in the field of safety and architecture. As soon as the names and addresses of the experts were known to the appellant he advised counsel for the appellee of these witnesses. This was done by letter hand-carried to the office of counsel for the appellee. This information was conveyed to the appellee approximately six (6) days prior to the actual date the trial began.

At the start of the trial, the appellant made a proffer of the testimony of the witnesses which they could be expected to give and called the Court's attention to the fact that it was the appellant's position that the pretrial order did not preclude him from using these witnesses during the course of the trial. The appellant further indicated to the Court that he was willing to continue the case to allow the appellee an opportunity to determine by the use of depositions or otherwise the exact nature of the testimony the experts would give. The Court, however, decided that these experts could not be called by the appellant and ruled accordingly. This decision by the Court was made even though there was no showing on the part of the appellee that the testimony of these experts would be prejudicial to it. The only reason offered by the appellee was the fact that the case had been prepared for trial on two previous occasions. The refusal of the Court to allow the appellant to present testimony from these experts greatly prejudiced the appellant's presentation of evidence and restricted the development of the appellant's allegations that the appellee had not provided him with a reasonably safe place to work.

The record clearly establishes that the appellee relied on two witnesses during the presentation of its defense. These witnesses, Joseph Bailey and Holmes Koerner, were listed by the appellee in accordance with the pretrial order. It is important to note that the deposition of both of these witnesses had been taken sometime prior to trial. Since their testimony had been preserved, any delay in the

trial that may have been necessitated by the introduction of the expert testimony would not have resulted in prejudice to the appellee.

No showing of prejudice was made by the appellee by the introduction of expert testimony on behalf of the appellant, nor could there be. The appellant readily concedes that there were delays in bringing this action to trial. However, the physical condition of the appellant and the extensive medical attention required to treat his condition resulted in most of the delay. Since the appellant had gone through so much, in the interest of justice he should have been given an opportunity to present all evidence available to him to support his allegations of negligence. The ruling of the Trial Court was erroneous and should be reversed.

At the time the appellant made this request to the Court there was precedent for granting it in *Meadow Gold Products v. Wright*, 278 F.2d 867. During the course of trial, the court was faced with the theory of the plaintiff's case. The trial court permitted the plaintiff to present evidence based on this alleged new theory, even though the trial judge and defense counsel expressed surprise that such a theory was then being presented. In affirming the decision of the trial court, the Court of Appeals stated that when presented with this type of a situation the trial court has the right to either declare a mistrial or reopen the case and permit the trial to proceed.

At no time in the *Meadow Gold* case, or in any other case known to the appellant, has a plaintiff been deprived of his right to present all the evidence available to him at the time of trial. If there had been shown that the appellee would be prejudiced by the admission of testimony by the experts, in the interest of justice the Court should have then continued the case or declared a mistrial.

A plaintiff's pretrial statement must be read in the light most favorable to him. See *Johnson v. Geffen*, 111 App. D. C. 1.

"Although a party is bound by the pretrial order rigid adherence to it should not always be exacted." *Borger v. Conner*, 210 A.2d 546

See also, *Blackwell v. Regal Cab Co.*, 114 App. D. C. 397.

Since the expert witnesses attempted to be called during the course of appellant's case were not "eyewitnesses" but were to give their expert opinions on the unsafe condition of the platform, their testimony should have been allowed.

"Experts are allowed to give their conclusions where the ability to draw conclusions from the facts stated depends upon professional training not within the range of ordinary training or intelligence." *Grober v. Capital Transit Co.*, 119 F. Supp. 100

In *Kenney v. Washington Properties*, 76 App. D. C. 43, 128 F.2d 612, the court stated:

"It is upon subjects about which the jury is not able to judge, as is the expert witness, that an expert is allowed to express an opinion."

(The subject is discussed in detail in 62 ALR 2d 1426).

The appellant strongly urged the Trial Judge to permit the use of these expert witnesses to testify upon the structure, design and unsafe condition of the appellee's loading platform, subjects which were properly within their professional training and not within the ordinary knowledge of a juror. The court, in *Capital Transit Co. v. Webb*, 79 App. D. C. 58, 142 F.2d 757, permitted an expert's opinion to show that the construction of a step was hazardous. The same use of an expert was attempted to be made by the appellant in the instant case. See also, *International Standard Electric Corp. v. Kingsland*, 83 App. D. C. 355, 169 F.2d 890.

The refusal to permit a plaintiff to call these experts as witnesses and to present their testimony was erroneous and for that reason this action should be reversed on this ground alone.

III

REASONABLE MEN COULD HAVE CONCLUDED THAT
THE APPELLEE'S RULES GOVERNING THE USE OF THE
LOADING PLATFORM CREATED AN UNSAFE PLACE
TO WORK

At the close of all of the evidence the Court directed a verdict in favor of the appellee. In so deciding, the Court indicated that there was a jury issue on the question of negligence on the part of the appellee and contributory negligence on the appellant's part. However, it was the decision of the Court that under Maryland law the appellant assumed the risk of his injury and was therefore barred from recovery. The appellant respectfully submits that the decision of the Court in so ruling is contrary to the established law in Maryland.

At the outset, it is important to note that Maryland has made a very definite distinction between what has been called "assumption of risk" and "incurred risk." The distinction has been clearly set forth in the leading case on this point, *Peoples Drug Stores, Inc. v. Windham*, 117 Md. 172, 12 A.2d 532 (1940):

"... The doctrine of assumed risk implies intentional exposure to a known danger, which may or may not be true of contributory negligence. As stated in A.L.I. Restatement of Torts, Sec. 893: 'A person who knows that another has created a danger or is doing a dangerous act or that the land or chattels of another are dangerous, and who nevertheless chooses to enter upon or to remain within or permit his things to remain within the area of risk is not entitled to recover for harm unintentionally caused to him or his things by the other's conduct or by the condition of the premises, except where the other's conduct constitutes a breach of duty to him or to a third person and has created a situation in which it is reasonably necessary to undergo a risk in order to protect a right or avert a harm.' An application of that rule to facts somewhat analogous

to those involved in this case is found in Illustration 9 to Comment C. of that section. The doctrine literally is not applicable to such a case as this because here there was no contractual relation between the parties, but this case falls rather within the doctrine of incurred risk which is derived from the maxim that 'Volenti non fit injuria.' "

In the *Peoples Drug* case the plaintiff was injured when he attempted to help a motorist on the Maryland highway whose car had become disabled. While so doing, the plaintiff was exposed to traffic on the highway and was struck by a truck. At the time of his accident there was a dense cloud of smoke obstructing the vision of other drivers operating on the highway. The court stated, in affirming a verdict for the plaintiff, that the plaintiff had not "incurred the risk" and that this issue was properly submitted to the jury for their consideration. The court held that Windham was not barred from recovery by contributory negligence, by assumed risk or by incurred risk. The court further stated that the plaintiff was not required "to anticipate that he would be exposed to a hazard not naturally incidental to his situation."

There are two important points to take from the *Peoples Drug* case:

- a) The jury was permitted to determine the question of the plaintiff's negligence and whether or not the plaintiff assumed or incurred the risk of injury;
- b) The court set forth for future decisions the distinction between "assumed risk" and "incurred risk", and further stated that in order to fall within either category the plaintiff would be required to anticipate that he would be exposed to a hazard not naturally incidental to his situation.

The law in Maryland, as further set forth in *Bull S.S. Line v. Fisher*, 196 Md. 519, 77 A.2d 142 (1950), a case somewhat similar to the instant case, clearly indicates that the issue of "assumption of risk" or "incurred risk" should have been left for the jury to decide. In *Bull S.S. Line v. Fisher, supra*, the plaintiff was a ship's carpenter and was injured as a result of the swinging of a load of lumber attached to a ship's boom operated by the defendant's employee. There was evidence that the plaintiff, Fisher, was aware of the fact that the load would swing and pass near where he had positioned himself. The defendant contended that Fisher assumed the risk of his injury and he was thus barred from recovery. The court stated:

"The appellant's theory on assumption of risk is that the appellee was thoroughly familiar with the nature of the operation, that he took the chance of the risks incident to it, that the winchman was thereby relieved from any duty toward him, and therefore the court should find that the entire risk of the accident had been voluntarily assumed by the appellant and so instruct the jury as a matter of law. The answer to this question depends largely upon what risk the appellee assumed and as to this, we find a wide divergence of opinion in the hundreds of cases which have passed upon this question. Assumption of risk before the passage of workmen's compensation acts was one of the common forms of defensive action in damage cases, although of late years, it has not been so prevalent. We find, however, that every risk is not necessarily assumed by one who works in a dangerous place or at a dangerous occupation. He assumes only those risks which might reasonably be expected to exist, and, if by some action of the defendant, an unusual danger arises, that is not so assumed. *Where there is a dispute whether the risk is assumed or not, that question is usually left to the jury.*" (Emphasis supplied)

It is very important for this Court in deciding the appeal to consider the decision of the Maryland courts that where there is a dispute whether the risk is assumed or not, "that question is usually left to the

jury." In directing a verdict for the appellee, the Trial Court failed to follow the controlling law in Maryland.

The appellant was not required to anticipate that he would be exposed to a hazard not naturally incident to his work activity. Although the appellant, Hewitt, was aware that the space provided for by the appellee was not sufficient he nevertheless had to perform his work. Mr. Hewitt's situation is no different from the situation presented to Mr. Fisher, the plaintiff in *Bull S.S. Line v. Fisher, supra*. To follow the Court's reasoning that the only alternative left to appellant Hewitt was to refuse to work on the platform would lead to a complete work stoppage in many types of employment. This certainly is not the law in Maryland, nor could it reasonably be the law. In a very recent decision of the Court of Appeals in Maryland, decided September 13, 1966, the Court once again set forth and defined the doctrine of "assumed risk" and "incurred risk". *Williamson Truck Lines, Inc. v. Benjamin*, 222 A.2d 375. In this case, the doctrine of "assumed risk" was said to be applicable, if at all, to a situation in which there is a contractual relation between the parties involved. "Incurred risk" is applicable when there is no contractual relation between the parties involved. It is reasonable to conclude that in the instant case, if there was a risk at all, the issue that should have been decided by the jury concerned that of "incurred risk". The *Williamson* case concerned the injury to plaintiff Benjamin when he was struck by a tractor-trailer on a highway while attempting to repair his automobile. There the plaintiff was well aware of his precarious position on the highway and so testified. The trial court, in rendering a verdict for the plaintiff, stated:

"His testimony was that several other similar vehicles had gone by that pulled out into the fast lane, and went by him and he assumed that this Defendant's unit would also go by. That is a heavily traveled highway and if he is going to jump out of the way everytime a vehicle would come along he would never get his car fixed, and he had the right, I think, to assume that

having his lights on that there should not be any danger to him because the lighted vehicle was visible to any of the traffic on the highway, and he had to try to fix the condition which had caused him to stop on the highway, . . ."

The defendant in *Williamson* referred to above moved for a directed verdict at the conclusion of the presentation of all evidence. The trial court refused to direct a verdict and the Court of Appeals held that the issue of negligence and the question of "incurred risk" were for the trier of fact.

Since there was no contractual relationship between appellant Hewitt and the appellee, it would appear that the doctrine of "assumed risk" would have no application to the instant case.

The issue then remains — Did the appellant "incur the risk" of his fall from the platform?

The key phrase in making this determination, as set forth in the prior decisions of the Court of Appeals of Maryland and most recently in *Williamson, supra*, is "a hazard not naturally incidental to his situation."

Can it be said that falling from the loading platform was a hazard *naturally* incidental to Mr. Hewitt's work situation?

There were hazards on the platform resulting from the movement of pallets. For example, had the appellant chosen to stand in the aisle that was required to remain open, and was struck by one of the hand trucks, this could be considered a hazard. But by no stretch of the legal imagination can it be said that falling off a platform was a hazard naturally incidental to Mr. Hewitt's situation.

The following colloquy took place between the Trial Judge and counsel for the appellant after the Court had granted the motion for a directed verdict:

"Mr. KOONZ: — so that I might be fully apprised in proceeding further with this case, may I have the Court's rationale on the assumption of risk here as the facts apply here?

"THE COURT: I think it is clear that Mr. Hewitt was aware of the conditions that existed at the time he was working there. He knew of those conditions, knew just as much about them as Safeway did; and I think that the principle of law stated in this Acme Paper Company case is clearly applicable.

"Mr. KOONZ: Isn't the Court saying that his alternative was not to work there?

"THE COURT: I think so, yes.

"Mr. KOONZ: Is this not an unfair burden upon this Plaintiff?

"THE COURT: I don't think so at all. I think that is one of the things we have in many cases of employees working under dangerous conditions. They either have to put up with the dangerous conditions or they don't work there. It is as simple as that."

In *Le Vonas v. Acme Paper Board Co.*, 184 Md. 16, 40 A.2d 43, principally relied on by the appellee and the Court in support of the granting of the motion for a directed verdict, one of the plaintiffs knowingly permitted a beam to come within several feet of a high tension wire. An electric arc occurred and both of the plaintiffs were injured by electric shock.

It is important to keep in mind that the *Le Vonas* case involved an action by employees of a contractor hired by the owner of the property. When applying the law to the facts in denying the plaintiff's recovery, the Court stated:

"... But while the owner must exercise reasonable care to have his own plant safe for employees of his contractor, he does not stand in the shoes of the contractor, for manifestly, if he is concerned only in the general results of the work and *has no control of the details and manner in which the work is to be accomplished*, he should not be liable for injuries caused to employees of the contractor

during the progress of the work. On the contrary, if the injury is such as might have been anticipated as a probable consequence of the work, and the employer took no precaution to prevent it, he can be held liable for negligence. In other words, liability for injuries to a servant of an independent contractor rests upon the owner when the premises on which the stipulated work is done remain under his control and the injuries arise out of the abnormally dangerous condition of the premises, the owner being chargeable with knowledge of the danger." *Smith v. Benick*, 87 Md. 610, 614, 41 A. 56, 42 L.R.A. 277; *Weilbacher v. J. W. Putts Co.*, 123 Md. 249, 256, 91 A. 343, Ann. Cas. 1916C, 115; *Hess v. Bernheimer & Swartz, Pilsener Brewing Co.*, 219 N. Y. 415, 114 N. E. 808; *Warner v. Synnes*, 114 Or. 451, 230 P. 362, 235 P. 305, 44 A.L.R. 904. (Emphasis supplied)

The Court further stated:

"... Electricity is now used so universally in city and country, in home and in business, for illumination and active power, and for communication and transportation, that it is a matter of common knowledge that any line carrying electric current is dangerous to a more or less degree. The fact that a wire is charged with electric current is notice of danger, and any person mindful of his safety should treat it with caution. When a person voluntarily touches, or approaches nearer than a reasonably prudent person would, an electric wire, which he knows, or which a person of ordinary knowledge and experience would have reason to believe, is sufficiently charged with electricity to be dangerous, and in consequence thereof he is injured, it will be assumed as a matter of law that his own negligence contributed to the accident." *Potomac Edison Co. v. State, for Use of Hoffman*, 168 Md. 156, 161, 177 A. 163, 166.

The Court specifically stated in *Le Vonas* that the defendant had no control over the details and manner in which the work was to be accomplished.

Certainly this was not true in the instant case. The uncontradicted evidence showed conclusively that Safeway had complete control over the details and manner in which the work Mr. Hewitt was performing was to be accomplished. In view of this fact, the appellant respectfully submits that *Le Vonas, supra*, is not authority under the circumstances of his case for denying him recovery as a matter of law.

"An employee need not quit his job rather than to do something which he knows or ought to know is dangerous." *Schirra v. Delaware L. & W.R. Co.*, 103 F. Supp. 812 (D.C. Md. Pa. 1952)

This statement by the Pennsylvania court is impliedly, if not expressly, the law in the State of Maryland. In a recent decision upholding a lower court ruling that the plaintiff assumed the risk of his injury, the Court of Appeals of Maryland stated:

"The appellant argues, however, that if he assumed the risk, it was not voluntary in that the appellees provided him with only one means of ingress and egress to and from the house and that the economic necessity of keeping his job and not being discharged for failure to deliver the sink tops forced him to involuntarily assume the risk of crossing the slippery walkway. The contention is clearly without merit because *there is no evidence that the owners of the house, or anyone else, ever demanded that the appellant use the walkway against his will. Nor is there any evidence that his job would have been in jeopardy had he left the sink tops on the construction site instead of taking them into the house.*" (Emphasis supplied) *Burke v. Williams*, 244 Md. 154, 223 A.2d 187 (1966)

There is no evidence that the appellant intentionally and voluntarily exposed himself to a known danger. Absent this evidence, the Trial Court erroneously granted the motion for a directed verdict in favor of the appellee.

The appellee had a duty to make the conditions of Mr. Hewitt's work activity on the warehouse platform safe. The complete and absolute control of the platform was that of the appellee. By rearranging the pallets on the platform or by stacking them inside the warehouse the appellant would then have had sufficient space within which to work.

"The elements which must be shown to give rise to the defense of assumption of risk are often stated to be, first, knowledge of the danger and second, a voluntary exposure to that known danger. To call this defense into play requires a showing that the person charged has no duty to protect the other from the risk." *Dougherty v. Chas. H. Tompkins Co.*, 99 U. S. App. D. C. 348, 240 F.2d 34 (1957)

The uncontradicted testimony of the appellant was that he was forced to work in a very narrow space.

"Q. Mr. Hewitt, how much room did you have to work?

"A. Well, from the end of the pallet to the truck, with the crates lapped over as they were, you didn't have over a foot at the most.

"Q. Why didn't you work in that aisle?

"A. Well, you couldn't work in that aisle because they had the forklifts coming back and forth through there.

"Q. Were you ever told not to work in that aisle?

"A. Mr. Koerner always said: Keep them as far to the edge as possible and keep the aisle open at all times.

He kept continuously hollering that at you all the time: Keep the aisle open at all times.

"Q. Were you attempting to keep the aisle open at this time?

"A. We had to keep it open. If you didn't, he would stop us from loading." (J.A. 58, 59; Tr. 140)

The clear import of this testimony establishes that Mr. Hewitt was not a volunteer. He did not voluntarily expose himself to a known danger. He was merely working in an area where the appellee insisted he work.

The evidence as a whole raises issues that the jury should have been permitted to resolve.

The evidence and all logical and reasonable inferences deducible therefrom must be given a consideration most favorable to the plaintiff's cause of action before taking a case from the jury. *Campbell v. Jenifer*, 222 Md. 106, 110, 159 A.2d 353; *Sears v. Baltimore & Ohio Railroad*, 219 Md. 118, 148 A.2d 366; *Sun Cab Co., Inc. v. Cialkowski*, 217 Md. 253, 142 A.2d 587; *Baer Brothers, Inc. v. Keller*, 208 Md. 556, 119 A.2d 410; *State, to Use of Bowman v. Wooleyhan Transp. Co.*, 192 Md. 686, 65 A.2d 321; *Dilley v. Baltimore Transit Co.*, 183 Md. 557, 39 A.2d 469, 155 A.L.R. 627.

IV

CHANGES IN USE OF LOADING PLATFORM ADMISSIBLE TO SHOW CONTROL

The appellant attempted to introduce evidence during the course of the trial to show that substantial changes on the use of the platform had been made by the appellee following the appellant's injury. The express purpose of the appellant's attempt to introduce such evidence was to show that the appellee had complete and absolute control over the existing conditions on the platform at the time of the appellant's injury. Since the appellant's allegations of negligence included a contention that the appellee had failed to provide adequate working space, the appellant should have been given an opportunity to present evidence to the effect that the appellee could have provided more working space on the platform.

This very issue has been the subject of prior decisions in the Court of Appeals. These decisions are ample authority for the admission of such evidence, and the Appeals Court has so decided in *Ackerhalt v. National Savings & Trust Co.*, 100 App. D. C. 312, and *Coca Cola Bottling Works, Inc. v. Hunter*, 95 App. D. C. 83.

By refusing to admit evidence of subsequent changes on the platform following the appellant's injury, the Trial Court has committed additional error which in and of itself is a reason for granting the appellant a new trial.

CONCLUSION

The appellant strongly urges this Court to give careful consideration to this appeal in view of the Maryland law set forth above. These decisions clearly indicate that under the circumstances of this case falling from the appellee's loading platform was not a risk naturally incidental to the appellant's work situation. More controlling and more important is the established law in Maryland that when the Court is faced with evidence such as was presented here, the issue of incurred risk should be decided by the jury. Especially is this true when the Trial Court has already stated, in granting the motion for a directed verdict, that jury issues were present on the question of negligence and contributory negligence. Since negligence and incurred risk are so closely connected it is difficult to understand how the Trial Court, by following the Maryland law hereinbefore mentioned, could take this case from the jury.

Since the appellant did not deliberately expose himself to danger, the judgment of the lower court must be reversed.

Respectfully submitted,

JOSEPH H. KOONZ, JR.

LEE C. ASHCRAFT

MARTIN E. GEREL

ASHCRAFT AND GEREL

925 - 15th Street, N. W.
Washington, D. C. 20005

Attorneys for Appellant

(i)

INDEX

	<u>Page</u>
Relevant Docket Entries	(iii)
Complaint for Negligence (Fall), Filed May 2, 1960	1
Answer, Filed May 20, 1960	2
Interrogatories to Defendant, Filed November 9, 1960	3
Additional Interrogatories to Defendant, Filed February 16, 1961	5
Answers to Interrogatories, Filed April 7, 1961	5
Answers to Interrogatories, Filed May 22, 1961	6
Motion to Amend Complaint, Filed July 26, 1961	7
Order Granting Plaintiff's Motion to Amend Complaint, Filed October 7, 1961	7
Answer to Amended Complaint, Filed October 12, 1961	8
Complaint for Negligence (Amended), Filed October 18, 1961	9
Interrogatories, Filed February 13, 1962	10
Answers to Interrogatories, Filed March 5, 1962	11
Pretrial Proceedings, Filed July 3, 1963	11
Letter from Hogan & Hartson to Clerk of the Court, with list of Defendant's Witnesses, dated July 9, 1963	14
Letter from Joseph H. Koonz, Jr. to Jeremiah C. Collins, Esq., with list of Plaintiff's Witnesses, dated July 17, 1963	15
Motion to Continue Trial, Filed February 29, 1964	16
Letter from Joseph H. Koonz, Jr. to Hogan & Hartson with additional names of Plaintiff's Witnesses, Filed October 4, 1966	17
Oral Motion of Plaintiff to Reopen Trial, Transcript of Proceedings, October 5, 1966	18

(ii)

	<u>Page</u>
Order Denying Plaintiff's Oral Application on October 5, 1966, Filed October 6, 1966	18-j
Objection to Wording of Order Signed by Pretrial Judge, Filed October 7, 1966	19
Excerpts from Transcript of Proceedings, October 10, 1966	20
<u>Witnesses:</u>	<u>Tr. Page</u>
Proceedings	3 21
Opening Statement by Counsel for Defendant	31 28
Sanford H. Eisenberg	
Direct	43 30
William Joseph Hewitt -- October 11, 1966	
Direct	118 49
Cross	165 62
Redirect	204 74
John J. Knight	
Direct	226 79
Paul F. Gay	
Direct	234 80
Ray J. Best	
Direct	243 82
Cross	251 86
John Owens	
Direct	253 87
Cross	259 89
Excerpts from Deposition of Joseph Bailey	262 90
Examination by Counsel for the Defendant	264 90
Excerpts from Deposition of Holmes Koerner	287 96
Examination by Counsel for Defendant	288 97
Proceedings -- October 13, 1966	348 105
Defendant's Memorandum in Opposition to Plaintiff's Motion for a New Trial, Filed October 21, 1966	110
Motion for a New Trial, Filed October 20, 1966	113
Notice of Appeal, Filed November 2, 1966	113

(iii)

JOINT APPENDIX

WILLIAM J. HEWITT	:	
	:	
v.	:	C. A. No. 1330-60
	:	
SAFEWAY STORES, INC.,	:	
a body corporate	:	

RELEVANT
DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>	
<u>1960</u>		
May 2	Complaint, * * * Jury Demand	filed
May 2	Summons, * * * of Complaint issued, ser. 5-4-60	
May 20	Answer of deft to complaint; * * *	filed
May 20	Calendared (N)	
June 1	Notice of deft to take oral depositions of pltf & of Joseph Bailey * * *	filed
Aug. 1	Notice by deft to take deposition of pltf & Joseph Bailey * * *	filed
Sep. 7	Notice of deft to take depositions of pltf & Joseph Bailey * * *	filed
Oct. 14	Notice by deft to take deposition of pltf * * *	filed
Oct. 21	Called, Assistant Pretrial Examiner	
Nov. 9	Interrogatories by pltf to deft * * *	filed
Nov. 18	Notice of deft of taking deposition of William J. Hewitt * * *	filed
Dec. 16	Notice by deft of taking deposition of pltf * * *	filed
<u>1961</u>		
Jan. 19	Deposition of Joseph Bailey, 10/5/60 (\$14.25)	filed
Feb. 16	Additional interrogatories by pltf to deft * * *	filed
Mar. 8	Objections of deft to interrogatories * * *	filed

1961

Mar. 9	Deposition of pltf, 2/27/61. (\$46.50)	filed
Mar. 21	First notice under Rule 13	
Mar. 23	Motion of pltf to stay Rule 13 * * *	filed
Mar. 23	Motion of pltf to compel answers to interrogatories * * *	filed
Mar. 29	Consent Order staying Rule 13 until June 29, 1961 (N) Matthews, J.	
Apr. 7	Answers of def't to interrogatories * * *	filed
Apr. 26	Order sustaining def't's objection to interrogatory #11(b) and overruling def't's objections to interrogatories #12 and #13 (N) Youngdahl, J.	
May 22	Answers of def't to interrogatories of pltf * * *	filed
July 26	Motion of pltf to amend complaint * * *	filed
July 31	Points and authorities of def't in opposition to motion of pltf to amend complaint * * *	filed
Oct. 12	Answer of def't to amended complaint * * *	filed
Oct. 17	Order amending complaint to include the specific acts of negligence (N) Youngdahl, J.	
Oct. 18	Amended complaint & jury demand	filed
Nov. 28	First notice under Rule 13	
Dec. 8	Motion of pltf to stay Rule 13 * * *	filed
Dec. 20	Order granting motion to stay Rule 13 (N) McGarraghy, J.	

1962

Feb. 13	Interrogatories of def't to pltf * * *	filed
Feb. 21	Objections by pltf to interrogatories * * *	filed
Mar. 6	Appearance of M. S. Mazzuchi as additional counsel for pltf (AC/N)	filed
Mar. 14	Order denying and sustaining objections to certain inter- rogatories (N) Sirica, J.	
Mar. 15	Answers of pltf to interrogatories * * *	filed
Mar. 27	Certificate of Readiness by pltf * * *	filed

(v)

1963

Jul. 3	Pretrial Proceedings, Pretrial Examiner	
Jul. 11	List of witnesses by deft	filed
Jul. 18	List of witnesses by pltf	filed

1964

Feb. 29	Motion of plaintiff to continue trial * * *	filed
Mar. 3	Order striking certificate of readiness (N) (AC/N) McGuire, C.J.	
Mar. 24	Certificate of Readiness by plaintiff * * *	filed
Oct. 1	Motion of pltf to increase ad damnum clause * * * (FIAT) - Remove from Ready Calendar * * * Keech, J.	
Oct. 2	Opposition of defendant to pltf's motion to increase ad damnum clause * * *	filed

1965

Mar. 19	Recommendation granting pltf's motion to increase the ad damnum clause from \$100,000.00 to \$300,000.00 (AC/N) Asst. Pretrial Examiner	
Apr. 12	Change of address of Hogan & Hartson. N/AC	filed
June 14	Notice of defendant to take oral deposition of Holmes Koerner * * *	filed
Jul. 8	Deposition of Holmes Koerner	filed
Aug. 19	First Notice under Rule 13	
Sep. 27	Cause dismissed, as of 9-20-65. (AC/N) (N) (By Clerk)	
Sept. 29	Motion of plaintiff to reinstate; points and authorities * * *	filed
Oct. 11	Order reinstating cause. (N) (AC/N) McGarraghy, J.	

1966

Mar. 11	First Notice under Rule 13	
Apr. 12	Certificate of Readiness by pltf * * *	filed
June 22	Motion of deft to advance for trial * * *	filed
Sept. 13	Motion to advance granted. (FIAT) (N) (AC/N) McGuire, C.J.	
Oct. 5	List of witnesses of pltf * * *	filed

1966

Oct. 5 Oral motion of pltf to re-open pretrial argued and denied.
(Order to be submitted) (Rep.: E. Alfred Kauffman)
(AC/N) Sirica, J.

Oct. 6 Order denying oral motion of pltf to be relieved of pro-
vision in pretrial order dated July 3, 1963. (N) (AC/N)
Sirica, J.

Oct. 7 Transcript of proceedings of 10-5-66; pp. 1-16. (Rep.:
E. A. Kauffman) filed

Oct. 7 Objection of pltf to order signed 10-6-66 by Pretrial
Judge * * * filed

Oct. 10 Jury sworn; two alternate jurors sworn; trial begun and
respired to Oct. 11, 1966. (Rep.: Ida G. Watson)
McGarraghy, J.

Oct. 11 Trial resumed; same jury; same alternates; alternate
juror #2 excused by the Court; respited to Oct. 13, 1966
at 10:00 A.M. (Rep'd: Ida Watson) McGarraghy, J.

Oct. 13 Trial resumed; same jury; same alternate; verdict for
deft by direction of Court; jury discharged. (Rep.: Ida
Watson) McGarraghy, J.

Oct. 13 Verdict and judgment for deft by direction of Court (N)
McGarraghy, J.

Oct. 13 Trial memorandum of deft filed

Oct. 13 All exhibits returned to counsel for pltf filed

Oct. 20 Motion of pltf for a new trial; points and authorities:
* * * filed

Oct. 21 Memorandum of deft in opposition to pltf's motion for a
new trial * * * filed

Oct. 28 Order overruling motion of pltf for new trial. (N)
McGarraghy, J.

[Filed May 2, 1960]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

CIVIL DIVISION

WILLIAM J. HEWITT
517 - 12th Street, S. E.
Washington, D. C.

Plaintiff

v.

SAFEWAY STORES, INC.
(a body corporate)
1845 - 4th Street, N. E.
Washington, D. C.

Defendant

CASE NO. 1330-60

COMPLAINT FOR NEGLIGENCE (FALL)

1. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. On January 10, 1959, the plaintiff was working on the defendant's platform at the latter's establishment located at 1338 - 5th Street, N. E., Washington, D. C., when a "dolly," used to convey merchandise, etc., being pulled by an employee of the defendant along the platform was so directed by said employee as to bear down upon the plaintiff, whereupon, the plaintiff, in justifiable fear of his safety, stepped away from the path of the "dolly" but over the edge of the platform and fell heavily to the ground.

3. As a result of the aforescribed negligence of the defendant, the plaintiff sustained a severely comminuted fracture of the upper left tibia and fibula, with dislocation of the fragments, for which he was

hospitalized immediately at the Washington Hospital Center. The plaintiff was operated upon at the hospital, underwent extensive skin grafting and additional surgery, placed in a plaster cast immobilizing both legs, and was subjected to other medical treatment. Although it has been approximately 17 months since the date of the accident, the plaintiff has not recovered and is still hospitalized. Plaintiff will retain permanent disabilities and disfigurement.

4. As a further result of the defendant's negligence, the plaintiff has suffered untold physical pain and mental anguish, has incurred very substantial expenses for medical care and attention and has experienced a loss of earnings and earning capacity.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of ONE HUNDRED THOUSAND DOLLARS (\$100,000) plus costs.

ASHCRAFT and GEREL
By /s/ Martin E. Gerel

JURY TRIAL REQUESTED

[Filed May 20, 1960]

ANSWER

First Defense

The complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendant admits that on January 10, 1959, plaintiff sustained a fall from a loading platform at the defendant's warehouse in Landover, Maryland.

2. Defendant denies that the plaintiff's fall as aforesaid was occasioned by any negligence or carelessness on its part or on the part of any of its agents, servants or employees.

3. Defendant is without knowledge or information sufficient to form a belief as to the injuries and damages, if any, sustained by the plaintiff.

4. Defendant denies each and every other allegation of the complaint not herein specifically answered.

Third Defense

The injuries and damages, if any, sustained by the plaintiff were the result of his sole or contributory negligence at the time and place alleged.

HOGAN & HARTSON

/s/ Paul R. Connolly
Attorneys for Defendant
800 Colorado Building
Washington 5, D. C.

[Certificate of Service]

[Filed November 9, 1960]

INTERROGATORIES TO DEFENDANT

The plaintiff, pursuant to the Federal Rules of Civil Procedure, propounds the following interrogatories:

1. Were "dollies", hand-trucks, or other like devices used by you on the loading platform at the time and place of the accident?
2. Explain the manner in which they are operated.
3. How is material normally moved from or onto freight trucks during loading or unloading on the platform?

4. Give the exact dimensions of the dollies, handtrucks, etc. in use in the general area of the platform at the time and place of plaintiff's fall. Specify their height, length, width, etc.

5. Set forth the exact length and width of the platform in question.

6. How is material moved from the platform to the interior of the building?

7. Give the names and home and business addresses of all persons known to you or your attorney(s) who were eyewitnesses to the accident, and state the location of each said eyewitness at the time accident occurred so far as is known to you.

8. State the names and home and business addresses of all persons known to you to have arrived at the scene of the accident following the occurrence thereof.

9. Set forth the names and home and business addresses of all employees known to you working on the platform on the day of the accident.

10. Was there an accident report filed as a result of this fall by plaintiff?

11. If a report was filed, kindly furnish the attorney for plaintiff with a copy of the report.

12. Have there been prior accidents of a similar nature on the platform?

13. List the dates of the accidents and the names and addresses of the persons involved.

ASHCRAFT and GEREL

/s/ Martin E. Gerel

* * *

Attorney for Plaintiff

[Certificate of service]

[Filed February 16, 1961]

ADDITIONAL INTERROGATORIES TO DEFENDANT

The plaintiff, pursuant to the Federal Rules of Civil Procedure, propounds the following interrogatories:

1. State the name and address of the warehouse superintendent in charge of the warehouse in question on January 10, 1959.
2. Within one year previous to the accident giving rise to this lawsuit, did any employee or servant of defendant or anyone who was required to work on the platform complain to the defendant, its agents or employees, that the working conditions on the platform were unsafe?

ASHCRAFT and GEREL

By /s/ Martin E. Gerel

* * *

Attorney for Plaintiff

[Certificate of Service]

[Filed April 7, 1961]

ANSWERS TO INTERROGATORIES

John J. Knight, being duly sworn, deposes and says that he is chief accountant for the defendant, Safeway Stores, Inc. and for answers to plaintiff's interrogatories served February 15, 1961 states:

1. State the name and address of the warehouse superintendent in charge of the warehouse in question on January 10, 1959.

Otis E. Bastin, 3413 80th Avenue, Washington, D. C.

2. Within one year previous to the accident giving rise to this lawsuit, did any employee or servant of defendant or anyone who was

required to work on the platform complain to the defendant, its agents or employees, that the working conditions on the platform were unsafe?

No.

/s/ John S. Knight

Subscribed and sworn to before me this day of ,
1961.

Notary Public

[Certificate of Service]

[Filed May 22, 1961]

ANSWERS TO INTERROGATORIES

John J. Knight, being duly sworn, deposes and says that he is chief accountant for the defendant, Safeway Stores, Inc. and for answers to plaintiff's interrogatories numbered 12 and 13 which were served on February 15, 1961, states:

12. Q. Have there been prior accidents of a similar nature on the plaintiff?

A. There have been no prior accidents of a similar nature.

13. Q. List the dates of the accidents and the names and addresses of the persons involved.

A. See answer to interrogatory No. 12.

/s/ John J. Knight

[Jurat]

[Certificate of Service]

[Filed July 26, 1961]

MOTION TO AMEND COMPLAINT

Comes now the plaintiff, William J. Hewitt, by and through his attorney, Martin E. Gerel, and moves this Court for an Order authorizing him to amend his complaint to add an additional allegation that the defendant failed to provide a safe place to work and prays that the attached memorandum of points and authorities be read as a part of this Motion.

ASHCRAFT and GEREL

By /s/ Martin E. Gerel

* * *

Attorney for Plaintiff

[Certificate of Service]

[Filed October 7, 1961]

ORDER

Upon consideration of Plaintiff's Motion to Amend Complaint, it is this 7th day of October, 1961,

ORDERED that the Complaint be amended to include the specific acts of negligence upon which the plaintiff relies in support of his action against the defendant.

/s/ Luther S. Youngdahl

 Judge Youngdahl

[Certificate of Service]

[Filed October 12, 1961]

ANSWER TO AMENDED COMPLAINT

First Defense

The amended complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendant admits that on January 10, 1959, plaintiff sustained a fall from a loading platform at the defendant's warehouse in Landover, Maryland.

2. Defendant denies that the plaintiff's fall as aforesaid was occasioned by any negligence or carelessness on its part or on the part of any of its agents, servants or employees.

3. Defendant denies each and every other allegation of the complaint not herein specifically answered.

Third Defense

The injuries and damages sustained by the plaintiff were the result of his sole or contributory negligence and/or assumption of risk at the time and place alleged.

HOGAN & HARTSON

/s/ Jeremiah C. Collins

* * *

Attorneys for Defendant

[Certificate of Service]

[Filed October 18, 1961]

**COMPLAINT FOR NEGLIGENCE
(AMENDED)**

1. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. On January 10, 1959, the plaintiff was working on the defendant's platform at the latter's establishment located at 1338 - 5th Street, N. E., Washington, D. C., when, because of the negligence of the defendant in failing to provide a safe place to work, the plaintiff was injured. The working space on the platform was not sufficiently adequate to handle the work that was required on the date of this accident. In addition, the defendant was negligent in failing to correct the unsafe condition of the platform on which the plaintiff was required to work. As a result of defendant's negligence, above described, the plaintiff fell from the edge of the platform and landed heavily on the ground sustaining injuries hereinafter alleged.

3. As a result of the aforescribed negligence of the defendant, the plaintiff sustained a severely comminuted fracture of the upper left tibia and fibula, with dislocation of the fragments, for which he was hospitalized immediately at the Washington Hospital Center. The plaintiff was operated upon at the hospital, underwent extensive skin grafting and additional surgery, placed in a plaster cast immobilizing both legs, and was subjected to other medical treatment. Although it has been approximately 21 months since the date of the accident, the plaintiff has not recovered and is still hospitalized. Plaintiff will retain permanent disabilities and disfigurement.

4. As a further result of the defendant's negligence, the plaintiff has suffered untold physical pain and mental anguish, has incurred very substantial expenses for medical care and attention and has experienced a loss of earnings and earning capacity.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) plus costs.

ASHCRAFT and GEREL

By /s/ Martin E. Gerel

/s/ Lee C. Ashcraft

/s/ Joseph H. Koonz, Jr.

* * *

Attorneys for Plaintiff

JURY TRIAL REQUESTED

/s/ Martin E. Gerel

[Filed February 13, 1962]

INTERROGATORIES

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the defendant requests that the plaintiff, William J. Hewitt answer in writing, personally, and under oath, each of the following interrogatories:

1. State with particularity and specificity the negligence, claimed by you to be attributable to the defendant, you claim was the proximate cause of your accident.

2. State with particularity and specificity the facts which you claim constitute the negligence claimed by you to have been the proximate cause of your accident.

HOGAN & HARTSON

By /s/ Jeremiah C. Collins

Attorneys for Defendant

* * *

[Certificate of Service]

[Filed March 5, 1962]

ANSWERS TO INTERROGATORIES

1. Objection sustained.

2. The platform on which the plaintiff was required to work was not sufficiently wide to handle the activity on the day of plaintiff's fall. Because of the number of pallets stacked on the platform and the need to keep a passageway open, the plaintiff was required to work close to the edge of the platform. As a result of this cluttered condition and the requirement of defendant to keep an aisle open, the plaintiff fell.

/s/ William J. Hewitt

[Jurat]

[Certificate of Service]

[Filed July 3, 1963]

[PRETRIAL PROCEEDINGS]

July 3, 1963

Tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS AND STIPULATE THERETO: On Jan. 10, 1959, P, an employee of the Atlantic Box and Basket Company, fell from a loading platform at a warehouse of D at 1338 5th St. N.E., Wash., D. C.

PLAINTIFF CLAIMS that said fall, his injuries and damages were caused by the negligence of D.

His specific allegations of D's negligence are as follows: D failed to provide an adequate working space for the work required of P because

the platform was not sufficiently wide to be capable of handling the work activity thereon on the day of P's fall; D failed to remove empty pallets from the platform; failed to correct a cluttered condition of platform; and D insisted on keeping a passageway open in the light of existing size and work activity on the platform thus compelling P to be near the edge of said platform.

All of the foregoing, P contends, constituted a failure on the part of D to furnish P with a safe place to work.

P's allegations as to the injuries and special damages sustained by him, caused by D's negligence, are set out in the statement attached hereto, made a part hereof, and incorporated herein by reference, marked "A".

DEFENDANT denies P's fall was the result of any negligence or carelessness attributable to it nor was the fall the result of any breach of duty on D's part. P's accident was the result of his sole or contributory negligence and/or assumption of risk at the time and place alleged since he apparently failed to see and appreciate his surroundings or to be mindful of them so as to conduct himself accordingly.

STIPULATIONS

The following may be admitted in evidence without formal proof, subject to all legal objections: hospital records; x-ray plates; HEW Mortality Table.

The parties agree to file with the Clerk of the Court and to mutually exchange, on or before Sept. 3, 1963, a list of the names and addresses of all witnesses known to them, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may

be used at the trial. Impeachment witnesses are not to be included.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before Sept. 3, 1963, and a similar exchange of all other such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice before, but not to interfere with, trial.

Counsel for P requests that D agree that the U.S. Fidelity and Guaranty Company has a lien, i.e. subrogated interest in this litigation, in the amount set out in a letter dated June 27, 1963, initialled by Examiner. Counsel for D will not agree to so stipulate but indicates he would agree to stipulate to said amounts provided the U.S. Fidelity & Guaranty Co. were made a party plaintiff in this action.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

Pretrial Examiner

TRIAL COUNSEL:

/s/ Martin E. Gerel, Esq. for P

/s/ Frank F. Roberson, Esq. for D

[Filed July 11, 1963]

C O P Y

HOGAN & HARTSON
800 Colorado Building
Washington

July 9, 1963

Clerk of the Court
United States District Court
for the District of Columbia
Washington, D. C.

Re: William J. Hewitt v. Safeway Stores, Inc.
Civil Action No. 1330-60

Dear Sir:

Please be advised that the names and addresses of witnesses known to the defendant at this time are:

Joe Bailey - whose deposition has been taken in this case
H. Koerner, 1225 - 13th Street, N. W.

Jay Wright, Adams Studio, 1523 - 22nd Street, N. W.

and the physicians who have examined, treated and cared for the plaintiff.

Very truly yours,

Jeremiah C. Collins

cc: Joseph H. Koonz, Jr., Esq.
Attorney for Plaintiff

JCC:jbr

[Filed July 18, 1963]

July 17, 1963

Jeremiah C. Collins, Esquire
800 Colorado Building
Washington 5, D. C.

Re: William J. Hewitt v.
Safeway Stores, Inc.
Civil Action No. 1330-60

Dear Mr. Collins:

This is to advise you that the plaintiff expects to call the following witnesses at the trial of this action:

Dr. Julius Neviasser
1918 K Street, N.W.
Washington, D. C.

Dr. Sanford H. Eisenberg
1918 K Street, N. W.
Washington, D. C.

Dr. Gerald D. Schuster
1918 K Street, N. W.
Washington, D. C.

Dr. Cornelius Frey
1532 - 16th Street, N. W.
Washington 6, D. C.

John J. Knight
Chief Accountant
Safeway Stores, Inc.
Washington, D. C.

Otis Bastin
3414 - 80th Avenue
Washington, D. C.

Holmes Koerner
1225 - 13th Street, N. W.
Washington, D. C.

Page 2
Jeremiah C. Collins, Esquire
July 17, 1963

Joseph Bailey
Address unknown

At the time of the pre-trial, it was the plaintiff's intention to increase the ad damnum clause from \$100,000 to \$350,000.

If you have an objection to our doing so on the day the trial begins, please let me know so that we can bring the matter before the Judge at once.

I am enclosing also copies of all medical reports contained in our file as of this date.

Best personal regards,

Very truly yours,
Joseph H. Koonz, Jr.

JHK:je

Enclosures

CC: Clerk of the Court
U. S. District Court

[Filed February 29, 1964]

MOTION TO CONTINUE TRIAL

Comes now the plaintiff through counsel and moves this Honorable Court for an order continuing the trial in the above entitled cause for the reason that plaintiff's counsel finds it humanly impossible to be adequately prepared for the trial which has been alerted for March 6, 1964.

Plaintiff's counsel has the following schedule for the next two weeks:

1. Trial alert, U.S. District Court--Monday, March 2, 1964.
2. Widows Death Claim, Formal Hearing, Bureau of Employees' Compensation, March 2, 1964.
3. Formal Hearing, Workmen's Compensation Claim, Bureau of Employees' Compensation, March 4, 1964.
4. Pre-trial, General Sessions, March 6, 1964.

5. Hearing on Summary Judgment Motion, Circuit Court for Montgomery County, Maryland, March 6, 1964.
6. Jury Trial, Court of General Sessions, March 9, 1964.
7. Jury Trial, Court of General Sessions, March 10, 1964.
8. Pre-trial, Court of General Sessions, March 9, 1964.
9. Non-support Hearing, Domestic Relations, Court of General Sessions, March 9, 1964.
10. Daily Assignment, U. S. District Court, Jury Trial, March 2, 1964.
11. Completed two day Jury Trial, U. S. District Court, February 27, 1964.
12. Opposition to Motion For Summary Judgment due March 5, 1964.

More compelling is the fact that the plaintiff is still totally disabled as a result of the injury giving rise to this action and will require additional surgery.

Thus in the interest of justice plaintiff respectfully requests that this trial be continued.

ASHCRAFT AND GEREL

By Joseph H. Koonz, Jr.

* * *

Attorney for Plaintiff

[Certificate of Service]

[Filed October 5, 1966]

October 4, 1966

Frank F. Roberson, Esquire
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C.

Re: William J. Hewitt v.
Safeway Stores, Inc.
Civil Action No. 1330-60

Dear Mr. Roberson:

In addition to the names and addresses of witnesses previously supplied to you in accordance with the pretrial order, I am submitting the names of the following witnesses who may be called on behalf of the plaintiff:

Robert W. Nordstrom
Architect
Post Office Box 505
Annandale, Virginia

Eugene L. Newman
1st and D Streets, N. W.
Washington, D. C.
Safety Engineer

Representative of American
Trucking Associations, Inc.
Operations Council
Trucking Data
Motor Carrier Docks Division
1616 P Street, N. W.
Washington, D. C.

Very truly yours,
Joseph H. Koonz, Jr.

JHK/mm

cc: Clerk of the Court
United States District Court
for the District of Columbia

[ORAL MOTION OF PLAINTIFF TO
REOPEN TRIAL]

TRANSCRIPT OF PROCEEDINGS

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Washington, D. C.
Wednesday
October 5, 1966

The above-styled cause came on before THE HONORABLE JOHN
J. SIRICA, United States District Judge, as a preliminary matter, at ap-
proximately 2:05 o'clock p.m.

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2

PROCEEDINGS

THE COURT: Is there a preliminary matter here this afternoon?

MR. KOONZ: Good afternoon, Your Honor.

My name is Joseph Koonz, counsel for plaintiff in Hewitt versus
Safeway Stores, Civil Action No. 1330-60.

Your Honor, this matter has been scheduled for trial on Friday. Pre-trial was held sometime ago in the case and at the time of the pre-trial, the pre-trial order recited that as of a certain date counsel should exchange names and addresses of witnesses.

Yesterday I became aware of two witnesses, expert witnesses to testify on behalf of the plaintiff. Last evening, by hand letter, I let Mr. Roberson, defendant's counsel, know of these witnesses.

It is our position that under the pre-trial order and under the local rules that apply to witnesses governing pre-trial orders there is no prohibition for us to at this time — since we have just become aware of the witnesses — to attempt to use these witnesses during the course of trial.

3 This is a very involved case which perhaps, I submit, has more injury and more actual special damages than perhaps any other case that has been before the Court. It is for that reason that we feel, as plaintiff's counsel, it is extremely important that this plaintiff have every opportunity to present each and every witness known to him that will help him in the presentation of his evidence.

I refer to local rule of the United States District Court Rules, this is a rule under Pre-Trial Hearings, Rule D, which states as follows:

Lists of witnesses. Each party should — and I emphasize the word should — submit at pre-trial hearing a list containing the names and addresses of all witnesses whom he intends to use during the time of trial.

As far as I know, there is no rule that prohibits at this time our introducing or our advising our adversary of witnesses. This is our position, and we feel that it is appropriate for us to, once having notified counsel, to expect to be able to use these witnesses at trial.

THE COURT: This complaint was filed on May 2nd, 1960; is that right?

MR. KOONZ: It is an old case, Your Honor.

THE COURT: What is the nature of the testimony that the expert witnesses may be able to testify to?

MR. KOONZ: One is a safety engineer, and he will testify as to the safety aspects of the condition at the warehouse platform at the Safeway warehouse. I have so notified Mr. Roberson of this fact. In other words, he will testify in his opinion Safeway, the defendant here, had created an unsafe condition and thus resulted in this man's injury.

The architect, who is the second witness, will testify that the design of the platform that was where this was taking place was not sufficient, size was not sufficient for the activity taking place at the time of the injury, and thus our conclusion is that this also is negligence.

The third witness that has been mentioned is not actually a witness. It is an association, the American Truckers' Association, and we have indicated a representative from that organization will testify as to the standard for area requirements for loading and unloading trucks at warehouses.

THE COURT: What kind of an accident was this?

MR. KOONZ: This gentleman, Your Honor, was working for a box and basket company unloading or loading actually, egg crates at the Safeway warehouse, this is their salvage warehouse. He was working

5 near the edge of the platform and during the course of his work he fell and very seriously broke his leg, to the extent that he has had no less than twenty-six operations, and he spent a total time of over thirty months in the hospital, has never worked a day since the accident.

THE COURT: What is the act of negligence that you rely on?

MR. KOONZ: We rely on several, Your Honor. No. 1, that the defendant created an unsafe working place for this plaintiff.

Second, that the work rules of the warehouse were not designed to accommodate the amount of work that was in fact insisted upon at the warehouse platform.

We rely on the fact that the architectural design of this platform was not of sufficient size to accommodate the work activity that was in fact taking place.

We rely further on the fact that because of Safeway's activity on the platform, it was extremely cluttered, messy, passageways were insisted upon being cleared but there was always a constant problem about travel of fork-lifts and various types of lifting devices.

6 It is our general position that this was an unsafe condition and that because of the nature of the work activity, in other words, there was so much activity on there for such a small space, as a result of these facts why the defendant has been negligent.

THE COURT: Well, of course, there is the problem here that they would be entitled to take the depositions of these witnesses if they wanted to.

MR. KOONZ: I have no objection to that.

THE COURT: Let me hear from the other side.

MR. ROBERSON: May it please the Court:

This is one of the oldest cases on the Court's calendar. It involves an accident that happened way back in 1959. The action was filed in 1960. It was pre-tried on July 3rd, 1963.

I have twice since that time, in 1964 and 1965, prepared this case for trial. The first time after it had been alerted, I prepared this case for trial on two separate occasions, now the third occasion, it is alerted to start on Friday morning.

The first alert went off at the convenience of Mr. Koonz, he had some other engagement. The second time it went off because Mr. Koonz, the moment after he had been alerted, decided he wanted to change the addendum from \$100,000 to \$300,000.

7 It has been alerted now for a couple of weeks to start Friday morning.

Incidentally, Your Honor, I started out with only two liability witnesses. One of those is gone due to this long delay; the other one I am having difficulty —

THE COURT: What caused the long delay in this case?

MR. ROBERSON: One of the reasons, it's been continued twice through the plaintiff's activities, and then failure to file a readiness certificate when Judge Keech took it off the ready calendar the last time.

But the pre-trial order of July 3rd, 1963 gave the parties two months to list —

THE COURT: What page is that on?

MR. ROBERSON: It is on page 2 of the pre-trial order, sir, the last paragraph.

THE COURT: Parties agree to file with the Clerk of the Court and to mutually exchange on or before September 3rd, 1963 a list of the names and addresses of all witnesses known to them, including medical and expert witnesses who have knowledge of any aspect of this case, indicating those who may be used at trial.

8 MR. ROBERSON: So in response to that, Your Honor, in July we exchanged lists of witnesses. The list from the plaintiff included eight witnesses, some of whom were medical experts, none of whom were the type of expert that we are now talking about. In other words, attempting to use an expert to say that this particular loading platform, which the man simply fell off of, was in the expert's opinion of unsafe design.

The pre-trial order specifically said that they were to include their experts and the experts that were included were not experts along this line.

When I received this notification late yesterday afternoon that he had come up with these three things, I explained to Mr. Koonz I couldn't go along with that now, my client was already very unhappy about the delays, the case has been advanced by Judge McGuire at my request because I had been losing witnesses due to this long time. It was advanced this fall by Judge McGuire.

So I think, Your Honor, that it is untimely that this request, and under the circumstances of this case if Your Honor has the discretion, and I believe that it should not be exercised to at this late date convert

this case into a battle of experts on a new and different type of expert
9 than it started out with.

I had a somewhat similar matter before Judge Curran some years ago in which his handling of the matter was denying the use of the experts because they failed to comply with the pre-trial order in this respect, denying permission of the plaintiffs to use that expert at trial was affirmed by the Court of Appeals.

THE COURT: Do you have that?

MR. ROBERSON: Yes, sir. The opinion is right brief, by Mr. Justice Burton, actually, and it simply says under the circumstances of this case we hold that the trial court did not err in excluding appellant's expert testimony.

The background of it was, in the case before Judge Curran — incidentally, that was another alleged structural defect case. Out in a Safeway store plaintiff had fallen over stubbed curbing in a parking lot. The attempt was made, despite the pre-trial order, by Mr. Maddox, to bring in an expert of building design, according to the proffer made by Mr. Zitomer this was of unsafe design and constituted a dangerous condition.

And Judge Curran refused to permit that and said that they were bould by the pre-trial order.

10 These witnesses, moreover, Your Honor, are of a type which for quite an independent ground would not be permitted to testify in the case. Here you have a loading platform and Mr. Koonz' client working near the edge, fell off the edge of the platform.

His contention is that the platform was too cluttered, it wasn't wide enough. We have photographs of the platform. That is the sort of ordinary common-sense thing the jury is supposed to decide on. Experts are not permitted to usurp the function of the jury on a simple non-technical matter like that.

THE COURT: There might be some doubt as to whether they would be permitted to testify.

MR. ROBERSON: I don't think they would. As a matter of fact, there is a case directly in point on that. It is an affirmance of a ruling by Judge Pine in Kinney against Washington Properties, which I have here. It is reported in 76 U. S. Appeals D. C. 43.

That is a case in which a hotel guest had been to a party and had a few drinks and that night — he was found the next day, had fallen out of a window, and the contention there was it was an unsafe windowcase, it should have been constructed differently, and if it had been, he wouldn't have had to reach out.

11 THE COURT: Was that the Carlton Hotel?

MR. ROBERSON: I don't believe it names the hotel. It simply says Judge Pine refused to permit an expert to testify the manner of construction of the windows made them dangerous. He let him testify then struck it. The Court of Appeals affirmed that. They said:

"The question, whether in the circumstances its use was dangerous, did not concern a technical matter, as to which expert evidence added anything to the common knowledge of the layman, but was a matter of observation and common judgment, in which the man of ordinary experience in looking at the window or hearing it described, was as capable of forming an opinion as an architect or builder."

They cited other cases from the District of Columbia including Walker against Dante, in which someone tried to use an expert that the condition on the street or sidewalk was dangerous, and it was summed up by Judge Groner saying:

12 "In all of these cases the conclusion is that to permit opinion evidence on subjects of the nature we are concerned with here would be a clear invasion of the province of the jury and would be erroneous."

I think that is the situation here.

So, for two completely sound grounds, plus the fact that this was an advanced case and that it is nearly eight years old now, we should not permit the plaintiff to go beyond the pre-trial order. He, like me, has prepared this case for trial twice before.

THE COURT: When was the last time it was called?

MR. ROBERSON: In the fall of 1965.

THE COURT: Counsel was in the case then?

MR. ROBERSON: Yes. Mr. Koonz and I have been in way back. He was in it when it was prepared, alerted for the fall of 1964, and it was continued because he was otherwise occupied.

If the pre-trial order is to mean anything it seems to me it would have to be complied with. There certainly hasn't been any showing of due diligence, but apart from that, as a practical matter, they couldn't use these men if permitted because of Kinney against Washington

13

Properties, and a similar line of cases.

THE COURT: I will give you a chance to reply. Do you wish to reply?

MR. KOONZ: I would like to, Your Honor.

I think several things should be pointed out to Your Honor. No. 1, we are talking about — in the interest of justice here —

THE COURT: Let me ask you a question. You are an experienced lawyer and I know your associate is. Do you mean to say you couldn't have gotten these witnesses and given the names to the opposition earlier than three or four days before the case is ready to be called for trial? What is your reason for that?

MR. KOONZ: Well, the simple answer is that I was not able to obtain such witnesses.

THE COURT: It is awful strange you got them three or four days before the trial gets ready to start.

MR. KOONZ: There is this, I think in fairness, Your Honor should know: The first thing is that the defendant has listed three witnesses for this trial. One is a photographer, two are employees of

Safeway. Both of those witnesses depositions have been taken. There is no problem —

14 THE COURT: When were the depositions taken?

MR. KOONZ: One of the witnesses for the defendant was taken, I think, in April of this year from Mr. Kroner.

MR. ROBERSON: It was taken the last time the case went over. That was, I think, a year ago.

MR. KOONZ: There should be a date on the deposition itself.

THE COURT: That's all right.

MR. KOONZ: My point is, as far as any prejudice to the defendant, there can be no showing of any.

The second most important point I feel is this: I don't stand before Your Honor saying perhaps in times in this case we haven't been dilatory, but there has been good reason. This man is a horribly —

THE COURT: Now when you talk about people being horribly injured — I was horribly injured myself once. I was struck by an automobile and almost killed. But the point is, just because somebody is injured doesn't mean they have to recover. I mean, there is a question of negligence. Both sides have a right to their day in court. I don't think the time has come when people have to pay out money just because somebody is horribly injured.

15 MR. KOONZ: I agree with that, Your Honor.

THE COURT: Your associate has been on the defense many times in cases, and I am sure he probably would agree with this statement.

But the point is, if pre-trial orders are to mean anything, it doesn't seem to me with a case six or eight years old, and you have been in it for sometime, and it would be different if you came in and said "I just got in this case," then maybe the Court might exercise its discretion, but here you have been in it and you know whether or not there is any unusual question of law in this case, and from what I have heard it seems to me it ought to be just a question of fact for the jury, and maybe this testimony you intend to offer may not be admitted.

But I am not passing upon that. There probably is good room for doubt.

But if pre-trial orders are to mean anything, I think you ought to be held to it, and I am going to sustain the objection in this case. I think you have had plenty of time.

All right. That is the ruling of the Court.

(Thereupon, hearing in the above-styled cause was then concluded.)

[Certificate of Reporter]

[Filed October 6, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM J. HEWITT,

Plaintiff,

v.

SAFEWAY STORES, INC.,

Defendant

Civil Action No. 1330-60

ORDER

This cause came on for consideration of plaintiff's oral application on October 5, 1966, to be relieved of the operation of the provision in the pretrial order, dated July 3, 1963, that:

"The parties agree to file with the Clerk of the Court and to mutually exchange, on or before September 3, 1963, a list of the names and addresses of all witnesses known to them, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial."

to permit plaintiff's use at trial of three expert witnesses bearing on whether defendant supplied plaintiff with a safe place to work, and after argument of counsel, it is by the Court, this 6th day of October, 1966:

ORDERED, that the application be, and hereby is, denied.

/s/ John J. Sirica

Judge

[Certificate of Service]

[Filed October 7, 1966]

**OBJECTION TO WORDING OF ORDER
SIGNED BY PRETRIAL JUDGE**

Comes now the plaintiff, through counsel, and moves this Honorable Court for a reconsideration of the wording of the Order signed by the Pretrial Judge on October 6, 1966 following oral presentation by counsel.

The plaintiff submits that the attached Order more accurately sets forth the ruling of the Court and should be the Order of record in the case. The transcript further reflects that the plaintiff at no time asked to be "relieved of the operation of the provision in pretrial order dated July 3, 1963". The plaintiff's request, at the time of oral argument, was to merely add the names of three witnesses to the pretrial list of witnesses previously submitted. It was, on the date of oral argument, and is the position of the plaintiff that the pretrial order did not preclude him from submitting the names of additional witnesses.

It was the decision of the Court that the objection of the defendant to the addition of these witnesses to the pretrial list of witnesses was sustained. The transcript of this oral hearing so reflects.

ASHCRAFT AND GEREL

By /s/Joseph H. Koonz, Jr.
925 15th Street, N.W.
Washington 5, D. C.
Attorney for Plaintiff

[Certificate of Service]

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

-----		:
WILLIAM J. HEWITT,		:
	Plaintiff	:
		:
v.		:
		:
SAFEWAY STORES, INC.,		:
	Defendant	:
-----		:

Civil Action No. 1330-60

Washington, D.C.
October 10, 1966

The above-entitled cause came on for trial before the HONORABLE
JOSEPH C. McGARRAGHY, United States District Judge, at 10:35 a. m.

* * * * *

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MR. KOONZ: May I approach the bench, Your Honor?

This will be fine right here.

Good morning, Your Honor. My name is Joseph Koonz. I am counsel for the Plaintiff in the case before Your Honor this morning, Hewitt v. Safeway Stores, Civil Action No. 1330-60.

Your Honor, as Plaintiff's counsel, we are coming before you at this time before trial to consider the matter of three expert witnesses.

I would like to begin by referring Your Honor to the pretrial order which has controlled the status of this case up to this time. The Court jacket will reflect that on July 3, 1963 a pretrial order was prepared and submitted by the Pretrial Examiner at a pretrial conference at which time counsel were present.

I refer to the second page of the pretrial order, the last paragraph, wherein it is stated:

"The parties agree to file with the Clerk of the Court and to mutually exchange on or before September 3, 1963 a list of the names and addresses of all witnesses known to them, including medical and expert witnesses."

4

Following the pretrial order and within the time specified, both parties submitted the names and addresses of witnesses. Plaintiff by letter, copy of which should be in the file, the original going to counsel for the Defendant, submitted at that time the names and addresses of all witnesses known to the Plaintiff.

Now last Tuesday Plaintiff first became aware of two expert witnesses. By that, I want to make the record clear: It is the first time that we were in a position to have and know of expert witnesses to testify on behalf of the Plaintiff.

THE COURT: Why is that?

MR. KOONZ: Well I think it is because prior to that time, try as we may, we were not able to get expert testimony.

THE COURT: Weren't they available three years ago?

MR. KOONZ: They may have been but we weren't aware of them. We made effort to secure expert testimony but on this particular day we were successful and I so notified counsel for the Defendant at once.

5 I might further add to the history of this case, as Your Honor well knows, this is an injury and action of long standing. However, in June, I believe, counsel for the Defendant filed a motion to advance to trial. There was no action taken on the motion until late in September of this year, at which time, unknown to me -- although, so the record may also be clear, we did not oppose the motion to advance -- the next word we had on the case, that it would be advanced, came in the form of a post card from the Clerk's office indicating that in September Judge McGuire had signed an order advancing the case.

On October 3, if my memory serves me, we were notified that the action was placed on daily assignment as of that time and would be called for trial shortly thereafter.

Now, keeping in mind the fact that we were under the impression for some time, at least through the summer, that the case would not be advanced and it would be reached in the regular course of time, which normally would have been some time from this date, when the trial was advanced, of course, we then had to proceed rather quickly to become prepared again for the trial today.

6 The witnesses, as I have indicated, are expert witnesses to be called by the Plaintiff. The first gentleman is a man by the name of Robert Nordstrom, who is an architect and has had extensive experience in the structural architecture. He will testify, after having viewed the Safeway warehouse platform, and from his expertise, that in his opinion the size of the platform was not sufficiently adequate to accommodate the work load that was in fact taking place on the day of the Plaintiff's Mr. Hewitt, injury. He will also testify, since the function of the architect is to establish not only the design of the building but the safety of

its occupants or anyone using this building, the design of this platform was not sufficient and was not safe for this work activity.

The second expert is a gentleman by the name of Newman, who is a certified and registered safety engineer in the District of Columbia. He has had extensive experience in warehouse safety. He tells me that he has viewed from a safety aspect about 1500 warehouses throughout the world. He also will testify on the basis of the information that we have conveyed to him and on the basis of the testimony that will in fact take place, be submitted, that in his opinion the Safeway warehouse did not provide Mr. Hewitt with a safe place to work, that the safety practices left much to be desired and that, in fact, in his opinion, there were several areas of safety that could have been corrected which would have avoided this accident.

* * * * *

***Under Section D of the pretrial rules, under the United States District Court Rules, where it refers to list of witnesses, the wording is this:

"Each party should. . ." --

It is not mandatory, but it says, "should."

". . .submit at the pretrial hearing a list containing the names and addresses of all witnesses whom he intends to use at the time of trial except those that may be used for rebuttal or impeachment purposes."

* * * * *

It has been the practice and I have seen that it is the practice and I am fully in accord with the practice, so that both sides may be fully apprised to avoid surprise and the opportunity for either side being caught unaware at the time of trial, these rules are of great importance and should be followed. However, there are times, as these cases I have referred to indicate, where for no explainable reason other than

the fact that in this case these witnesses were not available or unknown
 10 to the Plaintiff --

THE COURT: They were available.

MR. KOONZ: Well --

THE COURT: They were here. They didn't develop overnight.
 They have been available all the time. You just didn't have them.

* * * * *

11 MR. KOONZ:***

I would submit to the Court that as Plaintiff's counsel -- and I
 have discussed this with the Plaintiff -- we are not opposed and we
 would agree to either of two approaches to resolve this matter; that is,
 continuance of the case to a date certain to allow the defense an oppor-
 tunity to become fully apprised of these expert witnesses' testimony,
 or in the alternative, to have this action removed from the ready
 calendar and proceed then through its regular course back through a
 pretrial.

One last reference to a matter before Judge Sirica that took place
 on Wednesday of this past week. In reviewing the transcript, Your Honor,
 you will note that at the time we argued before Judge Sirica on this point,
 the request of the Plaintiff was merely, as it is today, to add these wit-
 nesses to the list already supplied. Nothing more. We did not ask that
 we be relieved of any pretrial rule or that we make an exception to the
 pretrial rule.

Judge Sirica sustained the objection interposed by the defense to
 the addition of these witnesses. It is my position, I submit that it was
 12 the position of the Judge that that was his ruling and nothing more. This
 matter then proceeded from Judge Sirica's courtroom to Chief Judge
 McGuire in chambers. This is not a matter of record but I will submit
 it to the Court subject to any verification or change that other counsel
 may feel is necessary. But in substance, the presentation before Judge
 McGuire was this, in chambers, with Mr. Roberson and Mr. Mazzuchi
 at the time were present. In the light of Judge Sirica's ruling on the

witnesses, could we then have the action removed from the ready calendar or could it be continued. Judge McGuire felt, and he used the term several times, that this was a generic disposition by Judge Sirica and that we would be well advised, that is, Plaintiff, to present this matter before the trial Court.

This is what we are here doing today. Thank you.

THE COURT: Mr. Roberson.

MR. ROBERSON: May it please the Court, I think that counsel's nice presentation of a difficult point is the same that he presented to Judge Sirica last Wednesday, which was overruled by Judge Sirica at that time. He geared it to the same points that he has now.

12 This is one of the oldest cases on the Court's calendar. It involves an accident that happened in '59. It has been in the Court since 1960. I have prepared it for trial twice after it had been alerted for trial. I prepared it in the fall of '64 and again in '65. Both times it was continued, the first time for the convenience of Plaintiff's counsel, the second time because he increased his ad damnum from \$100,000 to \$300,000. Now it is alerted for the third time and less than seventy-two hours before trial he comes forward with some allegedly expert witnesses, the existence of which, as Your Honor has pointed out, can't be disputed. They are not new witnesses in the sense that they just moved to the District of Columbia or couldn't have been searched out with due diligence, they are similar witnesses, if he thought this was essential to his case.

The pretrial order back in July 1963 gave him two months within which to supply names of witnesses, including experts, and he did supply the names of eight witnesses, including some experts but no experts along this line. They were medical expert witnesses that he supplied.

Now at this late date he wants to convert this into a battle of experts, one set saying this was a safe platform and the other it was an

14 unsafe platform.

16

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THE COURT: Did you want to say anything further?

MR. KOONZ: May I, Your Honor?

One pertinent point I believe is that there has not been and there cannot be shown by the Defendant, with this case continued, for example, or taken off the ready calendar, any prejudice to them. I say this for this reason: When the lists of witnesses were exchanged some time ago, the Defendant submitted, and has since stayed with that original list, three witnesses. One was a Safeway employee, who is now in North Carolina, a retired gentleman, whose testimony has been taken and it is a matter of record. His deposition was taken. And, incidentally, I understand he is not available now but, of course, his deposition is available. The second witness was a gentleman by the name of Joseph Bailey, who was Mr. Hewitt's, the Plaintiff's helper on the truck. He is not to be found. We have both been looking for him. But his testimony also has been recorded and transcribed in the deposition. The third witness is a photographer that has been listed by the Defendant, and I have no, and have indicated all along, objection and, in fact, intend to use the photographs in the presentation of the Plaintiff's case.

I only point that out as most times prejudice can be shown and the Court has a harder decision as far as whether or not to allow plaintiff to take the action he is requesting.

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***However, in this case we are prepared to show the Court why the areas that our experts are to testify to are without the realm of the average layman and do in fact need expertise to point out whether or not there are any safe or unsafe practices: In talking about the size of the platform, the use of pallets, hand trucks, fork lifts, the number of men involved, the loading and unloading space required for this activity, the architectural means whereby this platform could have been made safer.

All these things are without the realm of a layman and I submit are proper evidence for an expert to testify to.

* * * * *

19 THE COURT: Gentlemen, in this case the accident which is the
subject matter of the suit occurred in January 1959. The suit was filed
20 May 2, 1960. The pretrial is dated July 3, 1963 and the case has not
yet gotten to trial.

I think in passing upon these matters one of the factors which the Court is required to take into consideration is the duty of the Court to see that cases are tried. Now, obviously, if your motion to add the names of these two additional witnesses should be granted, it would involve a further delay in the trial of the case, that couldn't be avoided, which I don't think should happen.

Frankly, I think that this pretrial stipulation -- it is a stipulation by the parties to furnish "a list of the names and addresses of all witnesses known to them" -- means all witnesses known or who could be known to them by the exercise of diligence.

This isn't a case where some eye witness to an event, who has not been known by the parties, happened to make an appearance at the last minute. That would be a situation which might call for the exercise of discretion by permitting the adding of the name of that eye witness as a witness.

However, in this case you are talking about calling expert witnesses who, so far as we know, were as available three years ago as they are
21 today. They could have been identified three years ago as well as now.

I am of the opinion that the motion to add the additional names of witnesses must be denied. Frankly, I say this to you because I feel that way, but I also feel that Judge Sirica, as the pretrial judge, passed on the same question just five days ago. It was his responsibility to act. He ruled as he did. I agree with his ruling.

Don't misunderstand me. I am not saying that I am bound by his ruling. I think perhaps under the circumstances I could make a different ruling if I thought it was indicated, but I don't think it is indicated, so I will deny your motion to add the names of the two witnesses at this time.

Is there anything else we have to take up?

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31 OPENING STATEMENT BY COUNSEL FOR DEFENDANT
 MR. ROBERSON:***

* * * * *

34 The evidence is going to show you that when this lawsuit was originally filed about a year and a half after it occurred -- it occurred in January '59, the lawsuit was filed in May of 1960 -- the claim was that one of Defendant's employees had come along with a hand truck and in apprehension for his own safety, Mr. Hewitt had stepped back out of the way and had stepped off the edge of the platform.

Well, they have abandoned that claim because there wasn't any evidence to support it, and some two years and a half after the accident happened, in July of '61, they filed what is called a motion to amend the complaint, and now they just say generically there was a dangerous condition there and, therefore, it wasn't a safe place to work.

35 We expect to show you, as I said, the Safeway was not negligent because everything was perfectly open and apparent there, a condition which Mr. Hewitt was thoroughly familiar with, and that, therefore, nothing that Safeway had anything to do with in connection with this accident. It was just simply an unfortunate accident for which there can be no recovery against the Safeway Stores.

Thank you.

THE COURT: Ladies and gentlemen --

Were you going to say something?

MR. KOONZ: When you finish, Your Honor, I would like to approach the bench.

THE COURT: You may do so.

(Whereupon counsel approached the bench and the following proceedings were held:)

36 MR. KOONZ: Your Honor, I would like at this time to move for a mistrial on this ground: Counsel has, I submit, improperly stated to the jury the facts. The claim as originally filed had been amended and that amended complaint is a matter before this Court. By mentioning anything that preceded it is now putting or planting the seed in the jury's mind that the theory of negligence has changed or, as counsel's statement indicated, when they didn't have any evidence on that point, they

36 changed to another theory. I think it is highly prejudicial and it is improper. To leave this case in this posture now and let this jury decide under those circumstances I think can only result in an unfair trial, and it would seem evident that they can only perhaps arrive at one conclusion.

The opening statement is not a place for mentioning the complaint, as Your Honor has already indicated. It is a two-way street. If this type of opening statement is permitted, then there is no reason why the Plaintiff can't mention the ad damnum clause. You have already ruled on that, Your Honor, and I think this was highly improper and I think that the jury should not be allowed to decide the case in the light of what was presented by counsel.

MR. ROBERSON: Your Honor, the complaint on one theory is no different from any other admission. It bears on the accuracy of their second position. It is a material piece of evidence which I intend to introduce, what their original theory was and they have changed it.

It spells it out in the second paragraph of the original complaint. An employee came along and he had to step away. When we took Joseph Bailey's deposition, it was perfectly obvious they couldn't support this theory, so they abandoned that and did exactly what I said. I think that

37 is for the jury to say whether or not the second version is correct.

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THE COURT: I will deny the motion.

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40 THE COURT: Members of the jury, before we recess for lunch,
I want to remind you that you are jurors in this case and you will ultimately be required to decide the case basing your decision solely upon the evidence that you hear in this courtroom during the course of the trial. Therefore, you should keep open minds regarding these matters
41 until you hear the evidence. You have had the benefit of opening statements by counsel but you should not come to any judgment about the merits of this case until you hear the evidence from the witness stand.

* * * * *

43 SANFORD H. EISENBERG
was called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. KOONZ:

Q. Doctor, will you kindly state your full name and your office address, please.

44 A. Sanford H. Eisenberg, 1918 K Street, Washington 6, D. C.

Q. Doctor, will you be kind enough to tell us your background of your medical training? A. I received my medical training at the New York State College of Medicine in New York City. Following that, I took an internship for one year and then embarked upon the study of orthopedic surgery, which is that specialty in medicine which deals with diseases and injuries of the muscles, bones and joints. I took a three-year orthopedic residency at the Hospital For Joint Diseases in New York City.

Then I served in the Armed Forces doing orthopedic surgery. When I returned to civilian life, I continued my post-graduate training

in orthopedic surgery at the College of Physicians and Surgeons, which is part of Columbia University, taking x-ray and pathology as it applies to orthopedic surgery. I then was a Fellow of the National Foundation For Infantile Paralysis.

In 1951 I started the private practice of orthopedic surgery here in the Metropolitan Washington Area. I am a Fellow of the American Academy of Orthopedic Surgery, a Diplomat of the American Board of Orthopedic Surgery.

45 I am Associate Clinical Professor of Orthopedic Surgery, College of Medicine at Howard University and I am an attending orthopedic surgeon at many of the Metropolitan Washington hospitals. I have contributed many articles to the literature in my specialty.

* * * * *

46 Q.***

47 Doctor, can you tell us when you first examined this patient exactly what you observed and found from an orthopedic standpoint? A. Well, the examination of this patient was conducted with the patient lying in bed. His left knee was grossly swollen; it was deformed; it was warm and it was painful. The patient was unable to move the knee. There was a good deal of irregular mottling, where the color was a little bit different all about the knee area and the small area below the knee.

One could get a pulse in his foot and he was able to feel the examining hand below the knee. Any attempt at movement of this knee gave the patient a considerable amount of pain and also produced what we call crepitation, where you can actually feel things moving around and also hear noises.

The x-rays that were made when he was brought into the hospital were examined and they showed fragmented depressed fracture of the upper end of the tibia, which is the leg bone, and is one of the large bones which forms the knee joint. The surface of this bone was completely disoriented.

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49 Q. Doctor, can you describe from your past experience prior to this injury the severity of this type of injury that you have just shown?

A. Well, frankly, this is one of the most severe depressed comminuted -- meaning multiple fragments -- of a tibial fracture that I have seen.

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50 Q. Doctor, did you take a history from this patient of having sustained an injury? A. I did.

Q. Did the history indicate that the patient had fallen? A. Yes, sir.

Q. Would a fall such as the patient described result in this type of injury? A. Yes, sir.

Q. Will you tell me anatomically how this takes place, what causes the shattering of the bones such as occurred? A. The actual shattering of the bone is caused by the end of the femur or the end of the thigh-bone acting as a chisel into the center of the tibia, where this is pounded right
51 into the bone, and the tibia being slightly less dense in that area than the end of the thigh-bone, this is the bone that usually shatters and usually will take on the appearance of a deformed bone, where it will be depressed and will be widened.

Q. Doctor, once having determined what the patient's condition was, what then did you do to help him? A. Well, the patient's condition when I saw him certainly would not permit us to perform any surgery. He had already shown indications that the skin was under severe tension and showed evidence of early breaking down. So we were met with the necessity of decreasing the amount of swelling about the knee and the leg and this was treated by removing some of the blood from within his knee joint, by injecting various medicines into the knee joint in order to reduce the swelling, putting constricting bandages on the entire leg and keeping the leg immobile.

This form of treatment was continued for a little bit more than a month, and at that time that was the earliest that we thought that we could safely attempt surgery on this leg.

Q. Did the patient remain in the hospital during all this time,
52 Doctor? A. Yes, sir, he remained in bed in the hospital.

Q. Was he in a prone position in bed? A. Actually, he was
supine, he was lying on his back.

Q. What if anything was attached to his leg at the time? A. He
had what we call traction, where there is continuous weight pulling on
his leg to keep the bones from moving around.

Q. Now, Doctor, did there come a time about a month following
your initial examination that you did in fact perform surgery on the
patient? A. There did.

Q. And can you tell us approximately when that was? A. That
was on February 18, 1959.

Q. In February of '59 was the first surgical procedure? A. Yes,
sir.

THE COURT: February of '59.

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. KOONZ:

Q. Doctor, what then did you do for the patient? Was he put under
53 anesthesia? A. This was done under general anesthesia where he was
put to sleep.

Q. Then taken to the operating room? A. He was actually taken
to the operating room and then put to sleep in the operating room.

Q. What did you then do as an orthopedic surgeon? A. The knee-
joint was opened and the clotted blood that still remained in his knee was
removed and the amount of damage was inspected visually, and one did
observe that the shock absorber or the meniscus, as we call it, on the
outside of his knee was actually driven down the shaft of the tibia and
this shock absorber was removed. Multiple small fragments of bone
were removed. The joint surface or the articular cartilage was realigned

and approximated as best it could, similar to the way one would align a jigsaw puzzle. Unfortunately some of the pieces of the jigsaw were missing because they were actually driven down into the bone.

There was no fragment large enough to put any metal in, so that we could hold these fragments together. So that we used a plastic at that time in order to hold these fragments in the position that we had attained.

54 The wounds were then closed up, the various ligaments were repaired, and the patient was placed in a plastic cast and returned to his room.

Q. Doctor, was there any sign of infection up to this time? A. At this time there was no sign of infection.

Q. Then you followed the patient in his normal course? A. Yes.

Q. You continued to see him from time to time in the hospital?

A. Every day.

Q. Did he remain in the hospital after this first surgical procedure?

A. Yes, sir.

Q. Can you tell us, Doctor, what you continued to do for the patient while he was in the hospital? A. Well, the wound was inspected by windows in the plaster, and it was seen that a large area of skin over the site of the injury had lost its blood supply and was not living. Therefore, this tissue was removed. This procedure was performed in March of 1959. All the dead soft tissue was cut out and it was carried back to good living edges. At this time he did have some evidence of drainage
55 in the wound.

Following that, a few days later, he was taken back to the operating room, and at this time we put a split thickness skin graft on the patient. A split thickness skin graft is a skin graft that is actually removed from one part of the patient and is then placed over the area of defect. In Mr. Hewitt's case the defect being over the knee area.

The idea of using the split thickness skin graft is actually to make a closed wound out of what was an open wound, trying to make the field sterile. A split thickness skin graft in this area we know is a temporizing procedure, but in this case the important thing is to get this wound closed. If we can accomplish that, there are things that we can do later on to give him the necessary type of skin.

Q. Where did you take the skin from, Doctor? A. From his right thigh.

Q. And about how large a portion of skin was removed for the graft? A. About fourteen square inches.

Q. Can you indicate with your hands about how much area that was? A. (Indicating).

56 Q. Does the patient now have an area on his thigh that would still show? A. You can identify the area on his thigh, yes, sir.

Q. Now, Doctor, once -- from the skin graft standpoint -- the skin is removed from his thigh and placed in another portion of his body, will there remain in the area where the skin was removed for the graft a discolored area or an area that he will be continuously aware of? A. It is an area that you usually can identify.

Q. What does that skin lack that the normal skin has? A. Well, actually, once it heals, it doesn't lack any, shall we say, of the necessary components of skin, with the exception that due to your taking off a fraction of the outer surface of that, you will get a certain change in the pigmentation. So that from the area where you have taken a split thickness graft, due to changes in pigmentation, you can usually identify the site for the rest of the patient's life.

Q. It is discolored, is it not? A. Sometimes it will be darker and sometimes it will be lighter than the skin on the surrounding areas.

Q. Doctor, with this grafting procedure, it was how many times up to that point that he had been placed under general anesthesia? A.

57 Well, the grafting procedure was the third time.

Q. The third time. All right. Now, Doctor, did you have a good result from this graft? A. No, we did not.

Q. Was there any length of time that the patient was in any awkward position because of this particular graft? A. Not because of this particular graft.

Q. How soon after -- I believe here we are in March, are we not? A. Yes, sir.

Q. How soon after, Doctor, did you determine that the graft did not take? A. Well, this was determined within ten days. He continued to drain, and the graft actually floated off, so that we had no take of the split thickness graft, which meant that we would have to bring something with its own circulation to that area.

Q. So that the fourteen-square-inch portion of skin actually was like a gummed label on top of the skin that didn't actually adhere? A. Where the gum did not work.

Q. It didn't stick, in other words? A. That is right.

58 Q. That had to be removed? A. Actually, it removed itself. When you took the dressing off, this split thickness graft, instead of being adherent to the wound area, had actually floated off and all that you had left were the few sutures around the sides that were used to hold it in place.

Q. Was this a neurotic condition? How is the skin then, is it disintegrated in some way? A. It is very very friable. It falls apart as you tend to lift it up. Part of it is on the dressing and part of it just lying in the wound.

Q. Underneath that graft, what was there? What did you discover? A. There was an area of dead tissue and a certain amount of fluid.

Q. Was the opening that you were trying to cover to get inward healing in any better condition then, indicating that you had some progress there? A. I would say it showed no progress at all, that it was at the same state that it was before we started the split thickness graft.

Q. Up to this time, Doctor, can you tell us whether or not the
59 patient was in any pain? A. The patient would be in pain. We would
give him certain drugs for the pain, yes, sir.

Q. All right. Now did there come a time following this discovery
that the skin graft did not take place that you then proceeded to attempt
or to actually effect additional surgical procedures? A. Yes.

Q. How soon after that? A. The next surgical procedure was
performed on April 10 of 1959. This was actually the initiation of a
procedure which necessitated several visits to the operating room.
That one would do so much of the procedure at one time and await a
certain amount of healing; the patient would return to the operating
room; we would do an additional part; so that this procedure was some-
thing that went over a period of many months and required many opera-
tions.

This actually was what we call a cross-leg full-thickness flap.
This is actually using the skin from his other leg in an attempt to put
it on the left knee. While you are doing this, you let the circulation of
the good leg feed the skin flap.

This is one way of covering it. Shall we say it is a little bit
60 simpler as far as the patient is concerned, a little bit easier as far as
the patient is concerned than what we ultimately were forced to do in
this case. But in all events, we started out with the simpler procedure
in an attempt to get this wound healed.

The first part of the procedure was actually elevating a certain
area of skin on his right leg and just putting it right back again and let-
ting it stay like that. Then he comes back to the operating room and the
flap is elevated again, and it is put down. In this way you are producing
an area of increased circulation in an area of skin. On the third opera-
tion, one then actually detaches about sixty per cent of this skin flap
from the right leg and attaches it to the left leg. At this time the both
legs are immobilized so that the patient cannot wiggle this flap or pull
it off from its site on the injured leg.

It remains like this from three to five weeks, and then the flap is completely removed from the right leg and fastened onto the left or injured leg. And this is exactly what was done for Mr. Hewitt.

Q. Doctor, during this procedure, what position was Mr. Hewitt's leg or what positions were his legs forced to remain in?

61 A. Well, actually, we are trying to get the skin onto the left knee. We are taking the skin from his right calf. So, actually, his right leg is placed over his left knee, and he is placed in plaster in this position, and he has to remain in that position without any movement at all for a period of time that it takes for the skin flap to grow on the skin on the left leg.

Q. And that was for how long, Doctor? A. Approximately three and a half weeks.

Q. He remained in bed, I assume, all this time? A. Yes, sir.

Q. Was he completely immobile? A. As far as his legs are concerned, yes. At this stage his legs have to remain completely immobile. He can move his arms and he can move his body but he can't move his legs because they are wrapped in plaster.

Q. He had to stay in the bed twenty-four hours a day? A. During the period that we had his legs crossed, yes, sir.

Q. Was this plaster of Paris? A. Yes, sir.

Q. A plaster cast? A. Yes, sir.

62 Q. How much of his body was covered by the cast? A. Actually, this went up far onto his thighs, so that he had no motion at all in either knee and he had no motion in the ankles. He could elevate himself to a sitting position or he could go back a little bit, but there was no movement in either of his legs, with the exception of going up and down at the hip level.

Q. During this time, for example, could he go to the bathroom? That would necessitate what? A. That would necessitate using a bedpan and having the orderly help him on and off.

Q. Once this was done -- you indicated this took three additional general anesthetics? Three or four? A. Five.

Q. He made five trips to the operating room? A. Yes, sir.

Q. And was put to sleep. Now, Doctor, when the usual healing period, and so on, took place, what then did you have to do for him?

63 A. Well, he had shown a partial take of this skin graft when the operation was completed. In fact, immediately after it looked like the viability or the life of the graft had been maintained on the left side and it looked that way for a few weeks thereafter. However, the area did become somewhat red and somewhat swollen, and it did break down, and the drainage that was plaguing us from practically the time of the first operation again was a problem and it did cause a certain amount of breakdown of this full-thickness graft.

He continued to drain, the drainage was infected, and it was not responding to local or systemic medication.

Q. Doctor, could you locate for us the origin of the drainage? Was it in the bone, itself, the bony fragment or the soft tissue area surrounding the fragments? A. Well, actually, it was coming from the bone but the drainage, itself, has to come from the soft tissue because actually, with the exception of some blood supply, the material that he was draining was actually nature's way of fighting an infection, and this was coming by way of the blood stream and the tissue fluids.

Q. During this time, did the patient -- was Mr. Hewitt aware and did he have pain because of this problem? A. Yes.

64 Q. And as this continued you continued medication for pain? A. He would continue to receive medication as he needed it. The orders had been written for certain pain-killing drugs, and he would get them when he would indicate that he had a pain.

Q. Now, did the patient continue to remain in the hospital all this time? A. Yes, sir.

Q. Doctor, what next did you undertake to help this patient? A. The next procedure, in view of the fact that we knew this area was infected and that we had multiple fragments of bone in there, one way to control the bone infection -- and bone infection is called osteomyelitis -- is to go in and remove the involved areas of the bone; and this was done on June 30 of 1959. Several fragments of bone were removed and the wound at this time was actually packed open, where we put an antibiotic gauze right next to the open surface of the wound, and a pressure dressing was placed on top of it.

Q. Doctor, how large was this opening? Can you describe the size of this for us? A. At that time the opening was approximately three and a half inches long by about two and a half inches wide.

65 Q. If you looked into it, it was an undressed area and you could actually see, from the layman's standpoint, some of the soft tissue area, and so on? A. You could see the bone, too.

Q. You could actually see the bone? A. Yes, sir.

Q. Now Doctor, these bone fragments, were they from portions of the bone that was hurt when he fell, in other words, that had splintered off, or were these new fragments in the infection? A. Most of them were the old fragments of bone. At the time of the injury, the blood supply to these fragments had been completely destroyed, and with the infection there was no possibility of these fragments becoming incorporated in the main substance of bone, so that some of the fragments that were removed were the ones that had originated at the time of the injury. Some of the other fragments that were non-bony in origin were some of the plaster that we used and also some of the soft tissue that was infected.

Q. Now, were these floating free, as it were, in this area? In other words, they were not stationary or not attached with any degree of strength of any sort? A. Well, they weren't exactly floating free. Usually in a bone infection there will be a certain amount of reactive

66 tissue around. You can actually pick it out with your hand. But it isn't, shall we say, like the pingpong ball floating on water. They are not floating up on the surface. You go in and it is easy to take out, shall we say, the superficial fragments, but then the other areas of the bone that are involved are pretty firmly attached, and usually you use a hammer and chisel out the area of bone.

Q. Did you have to do that in this case? A. Yes, sir.

Q. In other words, you used pressure to release these fragments?

A. In certain areas of it, yes, sir.

Q. Doctor, did you realize or was it a fact occurring in this area of the opening, this open wound in the leg -- was that getting larger?

A. Yes, sir.

Q. It was. All right, Doctor, what then did you do, continue to do to try and help this patient? A. Well, following the removal of the bone fragments and this procedure actually is called saucerization. This left him with a fairly large opening in the leg, and also a large area of bone exposed. This required a fairly large flap of skin, and the only place
67 that such a large area of skin would be available would actually be from the abdominal wall. One raises a skin flap or tube on the abdominal wall and actually migrates it down to the leg.

This procedure was initiated by Dr. Frey, who is a plastic surgeon. The tube was raised on Mr. Hewitt's abdomen and then taken down by way of his left arm and then down to his leg. This tube was approximately eight inches long. In fact, a large portion of the tube could still be identified about Mr. Hewitt's knee.

Q. Can you show that to the ladies and gentlemen of the jury, Doctor, by the use of Mr. Hewitt's knee? A. Yes, if Mr. Hewitt will pull up his trouser leg.

(Whereupon the witness left the stand and approached the Plaintiff:)

A. Now, at the point that we are referring to in his record, we have an area on his leg that was open from here to here and from right

over there to over here (indicating). This is actually the remnants of the skin tube that was raised on his abdomen and migrated down to this point.

Now, at no time have we been able actually to get this wound completely closed. There is some infection that has remained in this area, as small fragments of bone have come out from time to time up until late in the spring of this year. Since that time, no further fragments have come out. I have probed in there with various instruments and the area feels like good strong bone. Now, if we can maintain this condition in Mr. Hewitt where no further fragments come out, what I will do will be go in and revise the area of bone right below the skin graft and attempt to close up that area of drainage that persists.

Incidentally, after the skin graft was performed, it was necessary, in order to give Mr. Hewitt some stability to his leg, to actually fuse the knee, where we made the femur and the tibia, the thigh-bone and the leg bone actually one bone. So that there is no movement at the knee-joint.

In addition, Mr. Hewitt, unfortunately, suffered a fracture of the lower part of his leg and he did not realize how serious it was, and by the time we saw it, it had healed with a good deal of aggravation and this is actually the deformity that exists at the lower part of his leg. As a result of the loss of bone and the fusion, it is necessary that he wear this elevation on his shoe. The elevation is two and a half inches back at the heel and two inches at the sole, so it gives him somewhat of
69 an inclined plane to walk on.

* * * * *

70 Q. Doctor, would it be helpful to use the original x-rays for comparison? A. I think it would be.

Q. Would you indicate for us again the date of this x-ray? A.
71 This is actually 1/13/59. And this is actually November of '65. And you

remember we mentioned the thigh bone or femur and the leg bone, the tibia, the two bones involved in the knee-joint.

Now, in order to stabilize this joint, after Mr. Hewitt had developed all the complications that we mentioned before, it was impossible for him actually to stand on this because the knee would actually wobble, and he had lost the restraining influence of the ligaments in there, and the only way that we could make it possible that he could actually walk without the knee giving way on him was to fuse it, where we make actually one bone between the femur and the tibia.

This is exactly what we did here. The area that you see in here is actually the area that was infected. Although these x-rays are from 1965, what you see in this cloudy area in here, at this time there was a considerable amount of remaining dead tissue in there that subsequently has been removed. The small fragments of bone that one sees right through there have been removed. Some of them have come out by themselves and some of them I have been able to take out by putting instruments in there and just scraping them out.

72 As you saw Mr. Hewitt's leg, he does have this skin over here, and if we take this bump, bone off here, we will have enough skin to close that over. The only big question is whether or not this infection is at the point where we can do this. Personally, I believe that if he stays the way he is for another two or three months, without getting any further complications, that this will be the time to try to close this up.

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73 Q. Dr. Eisenberg, with regard to the fusion of the knee, what does this mean as far as the patient is concerned in the future? Will that knee ever be able to be bent or used in any way? A. No. A fusion of any joint means eliminating all motion from the joint, and we did achieve fusion of the left knee in Mr. Hewitt. This is solidly fused and there is no motion at all now.

Q. Will he always have a stiff knee? A. Yes, sir.

Q. No matter what other procedure you do, that knee will stay stiff? A. Yes, sir.

Q. Doctor, how soon, if you can tell us, after this injury in January of '59 was the knee fusion in effect? A. The knee fusion was performed on September 14, 1962.

Q. Up to that time, had the patient remained in the hospital?
A. Well, at that time he would be in and out of the hospital. We would
74 perform some procedures, he would stay in for a certain length of time, and he would convalesce at home.

In 1962, when we did the fusion, he came back into the hospital.

Q. When do your records indicate, Doctor, that the patient was first discharged from the hospital? A. September 3, 1960.

Q. The patient had been in the hospital under your care continuously then from January 10, '59 until that time? A. Yes, sir.

Q. Doctor, is it fair to state that during this period, of course, he was totally disabled? A. Yes, sir.

Q. And after being discharged from the hospital -- when he left the hospital, what condition was he in as far as his ability to get around?
A. Well, at that time he was using crutches to get around and he would get around with the aid of the crutches.

Q. Was there a cast on his leg? A. Well, no, he didn't have a cast. He had a dressing on it at that time. And he would come into the office and we would take care of it in the office.

75 Q. Was he confined to his home? Were those your instructions that he remain at home or at least not become active? A. Well, he was instructed to remain inactive. In fact, we preferred that most of the time he sit down or keep his leg elevated because one of the problems that did bother us was the matter of swelling at that time.

Q. Doctor, after September 3, 1960, how soon do your records indicate he returned to the hospital for additional surgery or any extensive medical attention? A. He entered the hospital again on March 13 of '61, and he remained in there until April 3 of '61.

Q. For what purpose, Doctor, was Mr. Hewitt in the hospital?

A. That was the time we removed the sections of the bone in order to cut out the infection, the saucerization procedure.

Q. Did this necessitate general anesthesia? A. Yes, sir.

Q. And he remained in the hospital about a month? A. Just short of a month.

Q. And then was discharged once again?

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A. And to report to the office for treatment.

Q. Was he in a cast at that time? A. No, at that time he was in -- we had him fitted with a brace that he was wearing and the dressings were underneath the brace. This would actually effect immobilization.

Q. Was this a metal cast that was attached to his shoe and ran up his leg? A. Well, actually, it was a metal brace. It is not a cast. It is a supportive brace that is actually made for him with two large steel bars going down each side and the calf and thigh piece is molded to his size, and there is a lock on it for his knee, and his ankle, and another joint in it so that he could move at the ankle-joint, and the whole brace was then fitted into his shoe.

Q. I see. And would this completely immobilize this extremity?

A. From his hip all the way down.

Q. Would he have to wear this twenty-four hours a day, Doctor?

A. At the time he left the hospital, yes.

Q. For how long a period did he continue to wear this type of brace or how soon after that did he return to the hospital?

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A. He was permitted to go without the brace at night in the middle of July of '61. However, when he was out of bed he was supposed to wear the brace all the time.

He was readmitted to the hospital on March 7 of '62, and remained in the hospital to March 20 of '62.

Q. Doctor, for what purpose was he readmitted to the hospital?

A. At this time there was a draining sinus or a tract that went from the

skin all the way down to the bone, and it was discharging fluid, and this area was cut out in an effort to cut down and stop the drainage.

So the reason for this admission was for the removal of the sinus tract.

Q. On each of those occasions when you indicated you had to go back into the wound and attempt to remove some of the fragments, or whatever had to be done orthopedically or surgically, was the patient placed under general anesthesia? A. He was.

Q. And can you tell us from your records, Doctor, up to this time -- and I believe we are in March of '62, are we? A. Yes, sir.

78 Q. How many times had he been operated on up to that time?

MR. ROBERSON: Your Honor, to save time, if Mr. Koonz knows the answer, I am willing to stipulate?

THE WITNESS: Thirteen to that time.

BY MR. KOONZ:

Q. How many? A. Thirteen to that time.

MR. KOONZ: We know there were twenty-six overall. Will you stipulate to that?

MR. ROBERSON: Yes.

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82 BY MR. KOONZ:***

Q. Now, Doctor, up until the summer of this year, of '66, is it your opinion that the patient was totally disabled? A. Yes, sir.

Q. That brings us up to now, Doctor. When was the last time before today that your records indicate you had seen the patient?

A. On September 16 of this year.

Q. And was there any material change in his condition from that day than, for example, what you observed today? A. No, I would say his condition the last time I saw him in the office compared to today is identical.

Q. How long has that leg been in the condition, as we as laymen

can view it? How long has it been that way? A. It has been this way, I would say, for approximately a year. Prior to that time he did have a good deal of redness and swelling around the site of opening. This has subsided a good deal in the last year.

Q. Has all of this problem originated from his fall in January of '59? A. Yes, sir.

Q. Doctor, is the patient required to put a new dressing on that wound each day? A. Yes, sir.

Q. There is constant draining? A. Yes, sir.

Q. Emitting something, some fluid all the time? A. Yes, sir.

Q. Now, Doctor, for the future -- you have told us briefly but I would like for you to go into detail if you will -- just from your standpoint, with whatever degree of medical hope or probability or certitude you can give us, what can he expect, what can he hope for as far as his leg is concerned? A. Well, number one, he will never use that knee again. That knee is absolutely stiff. The shortening that he has will
84 remain, number two. Number three, we hope that we will be able to stop this drainage, although with the amount of complications and difficulty that he has run into, nobody could say with absolute certainty that they can achieve it until it has actually been done. I don't know whether we will actually close this wound over with the next operation or not.

Q. Doctor, is it conceivable that you would allow the wound to stay in its present status the rest of his life? A. It is conceivable that we will have to.

Q. Is there another alternative? A. The only other alternative is taking his leg off.

Q. You haven't arrived at that decision? A. I would very much decide against that unless there was any one compelling reason, where this drainage might endanger his life. In spite of the fact that he might walk better and it might be aesthetically nicer not to have a drainage

wound, I think anything you can do to keep a man's leg, no matter how, shall we say, damaged it is, still it is his leg and it is better than an artificial one.

Q. Doctor, is there anything emitting from this wound that could be offensive to him, for example? A. The drainage. The drainage does have an odor..

85 Q. Is this a constant problem? Is this something he constantly has to guard against? A. Yes, sir.

Q. Doctor, you have known this patient a long time, haven't you? A. I have.

Q. During the course of your treatment of him and work with him, have you discussed at all any of his background? Have you discussed at all his background, his educational background or work experience?

A. I have.

Q. Can you tell us, just from your contact with him for this length of time, whether or not in your opinion he will ever be able to return to any gainful employment? A. I seriously doubt it.

Q. Can you tell us, Doctor, whether or not -- from his present condition, how often if at all he will need medical attention in the future? A. I would say that a man with the problems that he presents as of now would certainly be wise to stay under medical observation for the rest of his life.

86 Q. At the present time, or at any time since January of '59, has there ever been a time that in your opinion he could have gone and done some type of gainful employment? A. No. There has not been.

Q. Do you have an opinion, Doctor, whether this situation will continue in the future? A. I don't see any reason for it to change.

Q. Can you tell us, then, whether or not you feel he will be able to ever work again? A. I don't believe he will.

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Washington, D. C.
October 11, 1966

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WILLIAM JOSEPH HEWITT

was called as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

BY MR. KOONZ:

Q. Mr. Hewitt, will you kindly state your full name and present address? A. William Joseph Hewitt.

119 Q. Where do you live? A. Saint Mary's County, Leonardtown, Maryland.

Q. How old are you, Mr. Hewitt? A. Fifty-three years old.

Q. Are you married? A. No, I am not.

Q. Were you ever married? A. Yes.

Q. Did you have any children? A. No, I lost my wife in childbirth.

Q. Were you ever married prior to that? A. No.

Q. How long ago was that, Mr. Hewitt? A. Been eighteen years ago.

Q. Mr. Hewitt, before January 10 of 1959, can you tell the ladies and gentlemen of the jury and His Honor exactly what your physical condition was? A. I was in number one condition. I was never sick a day in my life. I never had a broken bone. I was in good shape.

Q. Before that time, Mr. Hewitt, before January 10, 1959, by whom were you employed? A. The Atlantic Box and Basket Company.

120 Q. And where were they located? A. Florida Avenue Market, Fifth and Florida Avenue.

THE COURT: You will have to keep your voice up, Mr. Hewitt.

THE WITNESS: Up at Fifth and Florida Avenue Market.

BY MR. KOONZ:

Q. For how long before January 10, 1959 were you employed by them? A. Just about two years.

Q. What were your duties before this date for this company? A. Well, I went to the warehouses and picked up orders for them; I delivered orders for them; and I did whatever they told me to do.

Q. Did you operate a truck for them? A. Yes, I drove a truck for them?

Q. Did the company have more than one truck, Mr. Hewitt? A. At that time they had -- it was five trucks.

Q. At different times did you use different trucks? A. Well very seldom. I drove only the one truck.

Q. And what truck was that? A. I drove a -- it was about a '56 or '57 International.

121 Q. On January 10, 1959, did you have an occasion to use that truck for the Atlantic Box and Basket Company? A. Yes. They asked me to go to the Safeway warehouse at Landover, Maryland, and pick up a load of empty egg cartons.

Q. What day of the week was that, Mr. Hewitt? A. It was on a Saturday.

Q. And did you take this truck you just mentioned? A. I taken the green International that I usually drive and went to the Safeway warehouse.

Q. About what time of day did you arrive at the warehouse? A. I imagine it was somewhere between ten and eleven o'clock.

Q. In the morning? A. In the morning.

Q. When you arrived at the Safeway warehouse, can you tell us, number one, where the warehouse is located? A. The warehouse -- this was the salvage warehouse. It is located at the back of the other warehouses. They have a receiving warehouse and this is the last one back towards the garage.

Q. Where is it? Is it in Landover, Maryland?

122

A. It is in Landover, Maryland.

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Q. Did you have a helper with you? A. Yes, I had a helper with me.

Q. Do you recall his name? A. His name was Joseph Bailey.

Q. And were you operating the truck? A. Yes, I was driving the truck.

Q. Where was Mr. Bailey seated? A. He was riding with me on the seat.

Q. Was the truck empty when you arrived at the warehouse? A. The truck was empty.

Q. Do you recall how long Mr. Bailey had been working for this company? A. Well, I can't say exactly how long Mr. Bailey had been with them. Probably two or three weeks. He didn't work with me regular.

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Q. Now, Mr. Hewitt, can you describe for us what this truck looked like? A. It was about a -- around a ton and a half or two-ton stake body. It had a --

Q. May I interrupt you there and ask you to explain what a stake-body truck is? A. A stake body is an open truck, that has the slat sides on it, open top. And this body was a metal body. It wasn't a factory-built body; it was built special.

Q. Are you referring to the bed of the truck? A. No, the body on the bed.

Q. The body of the truck. A. And it was a special-built body. The body, I judge, was about six and a half foot wide, maybe seven.

Q. Is this, if you were looking at the back of the truck, the width of the body? A. The width of the body.

Q. Between six and a half to seven feet wide? A. And it was all metal, wasn't any wood in the body at all.

Q. How high off the ground was the tallest part, the highest part of

124 the body? A. You mean if you let your tailgate down?

Q. If the tailgate was down, how high was the tailgate off the ground? A. It would be about three foot.

Q. Now, when you drove into this warehouse complex, this area where these warehouses were, which warehouse were you going to? A. Going to the salvage warehouse.

Q. And what was there in the salvage warehouse? What were you looking for? What were you going to do? A. We was going to load empty egg cartons.

Q. When you pulled into the salvage warehouse, did you turn your truck around and back it to the platform? A. Yes, we had to.

MR. ROBERSON: Your Honor, I object to counsel leading this witness. He is suggesting how he got into there.

MR. KOONZ: I will withdraw the question and ask Mr. Hewitt.

BY MR. KOONZ:

Q. Mr. Hewitt, when you arrived at the salvage warehouse, what did you do?

125 A. We had to find a place to park because that place is always so blocked up with trailers.

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Q. When you backed up, in what position was the tailgate? A. I beg your pardon?

Q. In what position was the tailgate? A. The tailgate was down; it stayed down all the time.

Q. How was the tailgate secured to the back of the truck? A. It had two chains, one on each end, and the chains run from the back part of it up about, I'd say, eighteen inches on the back posts and fastened. It was on an angle.

Q. All right. Then what did you do, Mr. Hewitt? A. Then we went in the warehouse and told Mr. Koerner that we came there to get
126 empty egg cartons.

Q. Who was Mr. Koerner? A. Mr. Koerner was the foreman of the warehouse.

Q. When you backed the truck into the warehouse or against the platform, what part of the truck was touching the warehouse platform? A. The tailgate of the truck.

Q. Now, when you arrived, how did you get from the truck onto the platform? A. You had to climb up or get up on it. They had no steps or no way of getting up on the platform at all. From either the long side or the low end. There was steps on the far end, you could get up. That was clear up to the other end of the warehouse. The only way you could get up was climb up or climb up on the side of your truck and get up.

Q. When you parked your truck, Mr. Hewitt, did you part directly opposite a door? A. No, we didn't. We parked between the doors.

Q. How far from the door that the egg crates were located did you park your truck, if you recall? A. Oh, I'd say we was down probably a couple doors.

127 Q. When you arrived at the warehouse, did you observe the platform, itself? Do you recall seeing what was going on there?

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Q. Did you see what was there on the platform? A. Yes. Had the pallets on the platform. You had the -- what they call the forklift, the pallets where they were moving stuff up and down the platform.

MR. KOONZ: Your Honor, I would like to have these photographs marked.

Do you have any objection to the use of those photographs?

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129 THE COURT: They are in evidence, without objection.

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BY MR. KOONZ:

Q. Mr. Hewitt, I show you now what has been marked as Plaintiff's Exhibits A, B and C.

I show you first plaintiff's Exhibit A, and ask if you can identify that scene in the photograph? Is that the -- A. This is the platform, that is correct. The platform with the pallets like they are. The truck is not the same truck that I was driving.

Q. But is the platform the same as it was at the time you were there? A. The platform is the same as it was at that time.

Q. May I have this?

MR. KOONZ: If Your Honor please, I would like to show this photograph to the ladies and gentlemen of the jury.

THE COURT: You may do so.

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130

BY MR. KOONZ:

Q. Mr. Hewitt, can you tell us when you arrived at the warehouse platform what there was on the platform? A. There were pallets on the platform and the pallets were -- if this was the wall here, there was one pallet standing on the end; there was another pallet laid the long way against that pallet.

MR. KOONZ: If the Court please, we have in the courtroom pallets. These are rather heavy, Your Honor. We would like to have them marked as Plaintiff's exhibits.

THE CLERK: Do you want me to come down there?

MR. KOONZ: Would you mind, Miss Lyddane?

BY MR. KOONZ:

131 Q. Mr. Hewitt, can you see these pallets from where your are seated? A. Yes, I can.

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Q. Are these the type of pallets that were on the platform? A. Yes, they are the type of pallets that was on the platform.

MR. KOONZ: Your Honor, these pallets were brought to the Court under subpoena from the Safeway warehouse.

THE COURT: Are you offering them in evidence?

MR. KOONZ: I would like to offer them as Plaintiff's exhibit.

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THE COURT: Very well, they are received.

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BY MR. KOONZ:

Q. Mr. Hewitt, will you come down, please, and with the use of the first pallet, will you kindly indicate for us where the pallets were located on this warehouse platform?

(Whereupon the witness left the stand and approached the pallets.)

A. If you are going to use this for the wall, it would be standing upright.

THE COURT: Mr. Turner, will you help Mr. Koonz.

(Whereupon the pallet was set up.)

BY MR. KOONZ:

Q. Will you tell us, Mr. Hewitt, if there were any other pallets on the platform? A. Yes, sir, there was another one the long way against this one. Down flat on the floor.

(Whereupon the pallet was placed.)

BY MR. KOONZ:

Q. Was it in this position, Mr. Hewitt? A. Yes, sir.

Q. Now if you will return to the stand.

(Whereupon the witness resumed the stand.)

Q. When you arrived at the warehouse, you have indicated you went in to see Mr. Koerner. What did you request of Mr. Koerner?

135 A. I told Mr. Koerner that we came there to load empty egg cartons.

Q. And what then did he do for you? A. Then he called the man and told him to wait on us, just like he always does.

Q. And did someone from Safeway then wait on you? A. Someone from the warehouse brought out a pallet with egg cartons. It was 30 on a pallet. And they brought them out with a forklift and placed them as close to the edge of the platform as they could possibly get them.

Q. And where were they placed in relation to your truck? A. They were placed directly behind the truck, as near the center of the body as possible.

Q. Now, are you indicating or have you indicated, Mr. Hewitt, that these are the same type pallets that were used? A. They are the same type pallets that they had there at the warehouse.

Q. Now, where in relation to this exhibit we have was your truck? A. My truck would be backed up -- this would be the -- to the end of this tape, this would be the edge of the platform.

136

Q. Would you come down once again and show us where the pallet was placed behind your truck?

(Whereupon the witness left the witness stand.)

A. At the edge of the platform (indicating).

Q. Now, Mr. Hewitt, as you stand there, can you tell us how the egg crates were piled on this pallet? A. There would be four this way and there would be two this way and they would overlap the edge of it (indicating). The next layer they would have, they would have four this way and two this way (indicating). Which gave them six in a layer and they went six high.

Q. How far over each end would they lap? A. Oh, they wouldn't have them on there piled up close, it would be probably three, four, maybe six inches on each end.

Q. Will you kindly return to the stand, sir?

(Whereupon the witness resumed the stand.)

Q. On this day when you arrived, who took the pallets from the warehouse to your truck? A. I don't recall who brought them out. It was some of the Safeway employees.

137

Q. Did you bring any pallets out? A. I never brought a pallet out at all.

Q. Do you know from your own knowledge whether Mr. Bailey brought a pallet out? A. Mr. Bailey didn't bring any pallets out.

Q. The pallet was placed behind your truck? A. They were placed directly behind the truck.

Q. When you first arrived, Mr. Hewitt, did you begin at once to unload these pallets? A. Yes. When we first arrive, why, they bring the pallets out, and we had to get them as far to the side as possible because they had hand trucks, forklifts with pallets of crates where they were unloading off of the trucks.

Q. When you arrived, so we can get this straight, did you begin to unload these pallets? A. Oh, yes, we begin to unload those pallets and load them on the truck, the crates.

Q. Now, can you describe for us how this was done? In other words, how did you physically do this task? A. Well, when we first started, why, we would take -- because we had very little room, the platform was cluttered up --

138 MR. ROBERSON: He was asked what he did, Your Honor, not for an explanation.

THE COURT: Yes, tell us what you did.

THE WITNESS: We would take and shove the whole thirty crates right over into the body of the truck. Then we would get that pallet up and place it on top of the one like over there, be against the wall. So they would have the room to work. We would grade those crates. Those crates were not graded.

BY MR. KOONZ:

Q. What do you mean by grading the crates? A. There would be bad ones that couldn't be used.

Q. What would you do with the bad ones? A. We would stack them on the side of the truck, inside of the truck, and then afterwards we would have to bring them out and carry them and place them on the pallet over against the wall, just like those pallets would be over there.

Q. What would you do with the good ones? A. We would load the good ones on the truck.

Q. Did there come a time when you reached the point that your truck was beginning to get filled up? A. Well, when we got the truck about half full, why then we would have to take the crates off the pallets, about two or three at a time, because we didn't have room in the body of the truck for grading of them and loading them.

139 Q. Did you unload or load the pallet from the truck? A. Oh, no, they never put a pallet on the truck at all when I was hauling.

Q. Where was the pallet placed? A. Placed directly behind the truck as far to the edge of the platform as they could possibly get it.

Q. In this case you were unloading these egg cartons? A. Unloading off the pallets.

Q. Can you describe for us how you physically did this work? How did you actually do this? A. Well, the pallet was placed as near the center of the truck as possible, as close to the edge as they could get it, which gave you about ten or twelve inches between the end of your pallet and the side of your truck. You had to walk down about a foot. The truck was about a foot lower than the platform. You had to walk around. You could only take them off as they were placed on the pallet. You walked around in the aisleway where you had to watch for those forklifts coming through. If you didn't, they would hit you.

140 I picked up two crates, had them placed together like this (indicating) and walked on around the corner, which was very close, and as I stepped between the pallet and down on the truck, why, I fell off the edge of it. Didn't have very little room to walk. You didn't have room enough to walk there and be safe.

Q. Mr. Hewitt, how much room did you have to work? A. Well, from the end of the pallet to the truck, with the crates lapped over as they were, you didn't have over a foot at the most.

Q. Why didn't you work in that aisle? A. Well, you couldn't work in that aisle because they had the forklifts coming back and forth through there.

Q. Were you ever told not to work in that aisle? A. Mr. Koerner always said: Keep them as far to the edge as possible and keep the aisle open at all times.

He kept continuously hollering that at you all the time: Keep the aisle open at all times.

Q. Were you attempting to keep the aisle open at this time? A. We had to keep it open. If you didn't, he would stop us from loading.

Q. All right. Now, what was going on -- in other words, what use was
141 being made of the aisle at the time you got hurt? A. Well, they were using the aisle, like their trailers would be backed in, they would be coming in from the stores, bringing empty crates. They would unload those crates off on pallets and with forklifts and were going between that pallet and the other pallet over there, that aisleway. They would be lapped over and they would be hanging -- your pallet you would be working, they would be hanging in the others. There wasn't room to go through there.

Q. Mr. Hewitt, with the use of this fourth pallet, would you show us how this pallet was brought thru this aisleway, in other words, in what position it was?

(Whereupon the witness left the witness stand.)

Q. Is this the position? A. That is the position, that is right.

Q. That the pallet was in when it came through the aisle? A.
That is right. There would be a forklift. There would be a forklift that had a fork on each side that went in here (indicating) and they would be loading crates and the crates would probably be laying this far over on each side (indicating); and they would be loose crates that
142 they would throw off of their trucks and right on the pallet. And you absolutely had no room there to be there safe when this pallet was coming through.

Q. Now, were there trucks being unloaded or loaded next to the truck that you were working from? A. There were trucks backed up

all along the platform on the side. This would be the edge here (indicating). The pallet would be right on the edge, approximately. There would be trucks lined all the way up the whole platform. I don't know how long the warehouse is but it would be all the way up.

Q. And was there activity from other trucks going on at the time that you fell? A. Oh, yes, there were always those pallets be going back and forth, loading and unloading. If they had crates and stuff piled along the warehouse, pulled up on and through.

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143 BY MR. KOONZ:

Q. Mr. Hewitt, these trucks or forklifts that you have described, how were they operated? A. By a forklift, a hand -- pump them by hand, like hydraulic. Had a handle on them and you pumped them up like hydraulic.

Q. Was there sufficient room on the platform, when the pallets were placed in this position, for one of these trucks to pass the other on the platform? A. They would have to be loaded perfect, right up close to get through and nobody could be in the way there between them.

Q. Could two go pass at the same time? A. Yes.

Q. Two trucks? A. Two trucks?

Q. Yes. A. Oh, no, just room enough for one. Not room for one.

Q. When this was taking place that morning, when you were loading the egg cartons as you have described, had you done this before, Mr. Hewitt? A. Yes, sir. I have did it several times before.

144 Q. Had you at any time mentioned this condition to anyone at Safeway? A. I mentioned it to quite a few of them. I said: Somebody is going to go off this platform and get hurt.

MR. ROBERSON: Your Honor, I object to the admission of hearsay statements to somebody not identified.

MR. KOONZ: This is not hearsay. This is his statement.

THE COURT: Who did he make the statements to?

MR. KOONZ: Very well.

BY MR. KOONZ:

Q. Can you tell us to whom these statements were made? A. Well, you take Mr. Warren, the man haul out Southwest. They haul crates out there. I have talked to Mr. Warren's men, that someone is going to fall off that platform.

MR. ROBERSON: If Your Honor please, I move it go out as hearsay.

THE COURT: I will strike that statement and the jury will disregard it.

BY MR. KOONZ:

Q. Mr. Hewitt, when you were on that platform prior to this time --

145 Strike that.

Prior to this day when this occurred, when you fell from the platform, had the platform been used the same way it was the day you used it there? A. Since that time?

Q. No, before your accident. Was the use being made of the platform the same as it was at the time that you were hurt? A. Oh, yes, the use made ever since I been hauling out of there that way.

Q. All right. Now, prior to this day when you fell, on January 10, 1959, did you, personally, observe anybody fall or jump off the platform? A. I have fell off that platform once before myself but I landed, happened to land on my feet.

Q. Did you observe anybody else going off the platform? A. I seen several of the boys that work there that had jumped off out of the way of those pallets when they pulled over on the side.

Q. Do you know from your own observation what caused these people or yourself, prior to January 10, 1959, to have to go off the platform? A. There absolutely was not room on that platform for

146 the amount of work that was going on to be safe.

Q. Do you know from your own knowledge, Mr. Hewitt, whether or not all of the available space inside the warehouse was being used?

A. Well, no, it wasn't always filled up.

Q. Do you know from your own knowledge whether there was room inside the warehouse to stack these pallets? A. Plenty of room inside.

* * * * *

149 BY MR. KOONZ:

Q. Suffice to say, Mr. Hewitt, for how long a period from the time you were first admitted to the hospital to the time you were first discharged were you in the hospital? A. Just about -- it was just around two years for the first time.

Q. The first time?

150 A. From the time that I was admitted until I was discharged, just about two years.

* * * * *

159 MR. KOONZ: Before cross-examination begins, I would like to renew once again our request to allow the jury to view the platform, and in this regard I would like to call the Court's attention to the following cases that have permitted a view of the scene.

* * * * *

162 THE COURT: Very well. I will deny your request for a view.

* * * * *

165 WILLIAM JOSEPH HEWITT

resumed the stand and testified further as follows:

CROSS EXAMINATION

BY MR. ROBERSON:

Q. Mr. Hewitt, do you have a good memory? A. I do now, yes, sir.

* * * * *

167 Q. Weren't these questions asked you and didn't you answer this way under oath on your deposition on February 27, 1961?

Reading from page 56:

168 "Question: You say you were working on Saturday, is that correct?

"Answer: Yes, it was on Saturday, Saturday morning.

"Question: Is Saturday any different than any other day on the platform?

"Answer: Yes. You take Mondays and Saturdays, we had to bring those pallets out ourselves. The other days during the week Safeway had a man to bring them out.

* * * *

MR. ROBERSON: Page 57.

"Question: Now, normally, would you stay there on the platform for somebody else to bring the pallets in and out?

169 "Answer: What crates we was loading, we'd take off and put the pallet on the side and they would have a man to bring the pallets out but on Mondays and Saturdays we had to do it all ourselves."

BY MR. ROBERSON:

Q. Were those questions asked and did you answer that way?

A. If I answered them that way, I guess I did, but it wasn't correct.

* * * *

172 Q. The name of your company that you were working for and paid you your wages in January of 1959 when the accident happened was Atlantic Box and Basket Company, isn't that so? A. Atlantic Box and Basket.

Q. You didn't get any check from Safeway, did you? A. I didn't do anything for Safeway.

* * * * *

174 BY MR. ROBERSON:

Q. Isn't that right, Mr. Hewitt? A. I don't know if they had a contract or what. I never read any papers. I never seen any papers. All I did was what the boss told me to do.

* * * * *

175 Q. And when your company got these used egg crates from Safeway, they would resell these egg crates, wouldn't they? A. Resell them?

Q. Yes. A. Yes.

* * * * *

178 Q. Now, on the morning of your accident, is it your position now that you want the jury to believe that Safeway people brought the pallet out or that you or Joe Bailey brought it out? A. Safeway people brought those pallets out. We didn't bring them out.

Q. Contrary to what you said three times in the deposition, you now say that they brought them out? A. Yes.

* * * * *

Q. Sir? A. Safeway men brought the pallets out.

Q. Well, how many did you unload that day? How many pallets did you unload before your accident occurred? A. I never counted them.

Q. Well, approximately how many? Was this the first one that you had unloaded? A. Oh, no, we had unloaded a few. I don't know.

179 I never counted how many we unloaded.

* * * * *

Q.***

Were all of the pallets brought out that you were to unload that day at the same time or were they brought out one, then you would unload it, and they would bring out another? A. They would only bring one at a time.

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Q. And then after one pallet was unloaded by you and your partner onto the truck, who would take this pallet up and put it back on the stack over against the wall? A. We would have to take the pallets up.

Q. You and Joe Bailey would pick it up and walk across this aisle? A. Whoever was working would have to put the pallets back over, stack them against the wall.

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Q. That is right. Did you unload as many as four or five pallets before this? A. It probably was more than that.

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Q. These were collapsible crates, weren't they? They were flattened out? A. Oh, no, no, they wasn't flattened out. They were still sitting out. Those crates had never been knocked down.

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181

Q. So it is your testimony that when you and Joe Bailey were beginning to unload crates, they were about how high? A. The egg crates, they put thirty on a cart; there were six to a layer.

Q. How tall was one crate?

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Q.***

182

And when the egg crates were brought out, there would be how many stacked on top of each other? A. There would be thirty on a pallet. There would be four this way.

Q. I didn't ask you that, Mr. Hewitt. Listen to the question.

I said, how many would be on top of each other? Would there be six high? A. Would be six high.

183

Q. They would extend six feet above the floor of that pallet, is that right? A. Approximately six feet above.

Q. And on each level there would be six crates? A. Would be six crates to a tier.

Q. So altogether on the pallet there would be six times six or thirty-six egg crates, is that right, sir? Six on a row and six rows?

A. No, there would be thirty, they have five high.

* * * * *

184 Q. So you did not mash the crates down either before or after you loaded them on the truck? A. We never mashed any down at all.

Q. Now, when the pallet was placed by whoever placed it behind your truck, was it placed approximately the middle of the back end of your truck? A. About as near center as they could possibly get it.

Q. Did you or Joe Bailey move it any after it was placed? A. No, you couldn't move it; the crates was on it.

Q. Well, you could move it if you wanted to, couldn't you? A. I wasn't going to lift that pallet with those crates for no reason.

185

Q. You say no reason? A. There was no reason for us to move it by hand.

Q. I thought you had indicated here earlier you didn't consider there was enough room around the end of the crates for you to walk onto your truck? A. There wasn't.

Q. Although you had approximately a foot there? A. That is right, that is about all you had.

Q. If you had it moved down to one side of the truck, you would have had about two feet, wouldn't you? A. How would you get them off this other end? You would have to walk all the way around that aisle. Mr. Koerner always hollered: Keep that aisle clear at all times.

Q. You are saying that you preferred to have it in the middle of the truck? A. That is the only way you could work it.

Q. It would have been physically possible, of course, to have unloaded the crates from one end, wouldn't it? A. It would have been much better if the platform had been wide enough so you could set it back.

Q. I didn't ask you that, Mr. Hewitt. I asked you if it was physically possible to unload the crates from one end? A. No, you couldn't do it that way.

Q. It couldn't be done? A. That is right.

Q. Is that your answer? A. That is right, you couldn't do it a safe way, you had to walk all the way around.

Q. When you picked up the crates from this side, the side closer to the truck, would you be standing on the truck? A. You would be standing on the truck.

Q. How many would you pick up at one time? A. Oh, probably a couple, three, depends on the way they were placed on there.

Q. You could handle at least two, couldn't you? A. Oh, yes, you could handle two.

Q. They weren't heavy, were they? A. Oh, no, nothing but cardboard.

Q. They weren't bulky; they didn't come up and cover your vision?

187 A. Not unless you had to hold them up, if the pallet was at the end, hold those crates up, go around to the end before you got the first two or three layers off. You had to hold them up.

Q. How near was your pallet to being unloaded when you had your accident? A. We had just started on that pallet, unloading it.

Q. You are now saying that you unloaded the pallet and were walking with egg crates in front of your face? A. No, I didn't say that.

Q. You could see where you were going? A. I said you didn't have room enough. You had to feel your way through there.

Q. Could you see where you were going at the time of your accident? A. I don't say that you could see clear down there.

Q. Could you or couldn't you? A. Well, you stop and look right down, you could, but you had to watch where you was going above, too.

Q. The bed of your truck, itself, was approximately a foot lower than the level of the platform, wasn't it? A. That is right, you had

188 to watch that walk; you had to watch the step off the platform and you had to watch the crates on the pallet and you had to watch the side of your truck.

Q. And you had done that unloading some four, five pallets before the pallet where you were hurt, isn't that so? A. At the starting of this, you put your pallet there, you shove those crates all in the truck.

Q. Mr. Hewitt, listen to my question. You had followed this procedure in unloading some four or five pallets before you were unloading the one when you were hurt, isn't that so? A. I don't say we unloaded them that way, no. I say, they could have been shoved off. I don't say that -- that may have been the first one that we unloaded that way.

Q. Well, it was up to you how you unloaded them, wasn't it? A. No, it was up to the room that we had. We had to work according to the room on the platform and according to the room in the truck.

Q. It didn't make any difference to Safeway whether you took these things off here and threw them on your truck or whether you picked them up and carried them one at a time?

* * * * *

189 Q.***

On the day of your accident, were the rear wheels of your truck up on chocks to bring the truck bed level with the platform? A. They never used anything like that at that time.

* * * * *

Q. Nobody ever told you you couldn't bring some chocks there of your own, did they, if you wanted? A. I didn't have the say to go out and have them built.

* * * * *

190 THE COURT:***

Did anybody tell you not to do it?

THE WITNESS: Nobody ever mentioned anything like that one way or the other.

BY MR. ROBERSON:

Q. You knew you were going to have to step down from the platform level to get down to the level of your truck bed, didn't you? A. That is the only way you could get down.

Q. Unless you raised the wheels of the truck by driving them up on chocks. A. They never gave us any to do that with.

Q. Then you knew you had this distance to step down, didn't you, when you went out there? A. You had that on that truck, yes.

Q. And before this accident, you had worked for Atlantic Box and Basket Company for about how long?

191 A. I'd say approximately two years.

* * * * *

Q. You had been out there quite a few times before the day of this accident, hadn't you? A. I had been out there some times.

* * * * *

192 Q. No. Will you give us your best estimate as to how many times you had hauled crates away from this Safeway Warehouse before the date of this accident? A. I might have hauled one day a week. I don't remember. I hauled out of other places.

Q. I am talking about this warehouse, this platform, approximately. A. I don't remember how many times I hauled. Maybe one day a week.

Q. I asked you for your best recollection. A. I say, maybe one day a week.

Q. Over how many months or years had you been doing that? A. A couple of years. I don't remember. It's been about two years.

Q. So if there are fifty-two weeks in a year, you had hauled, roughly, a hundred times away from this place? A. Probably so. We didn't haul those kind of crates all the time.

Q. And throughout that time it was the same platform? Throughout this two-year time it was the same platform? A. Same platform.

Q. The same amount generally of activity was going on on that platform during that two years? A. Well, there would be the same way.

193 Q. From day to day it would vary? A. It was always cluttered up. You always had a mess there. It didn't matter what day you went there.

Q. I didn't ask you that, Mr. Hewitt. I asked if about the same amount of activity approximately wasn't going on on that platform throughout the two years?

* * * * *

A. What do you mean by activity?

Q. People moving around, loading and unloading. A. I say, it was going on every day I was there.

Q. You always considered this was a very dangerous situation out there? A. It was; it always was dangerous.

Q. You considered it so yourself? A. Lots of the rest of us consider it, too.

Q. I didn't ask you that. I asked you if you did? A. Yes, sir, I considered it.

Q. You never complained about that condition on the platform, did you? A. It wasn't anybody there to complain to.

194 Q. Wasn't there somebody in charge of the warehouse? A. If I had went there and complained about hauling from that platform --

Q. Answer my question, Mr. Hewitt. Wasn't there anybody in charge of the warehouse? A. Mr. Koerner was in charge.

Q. You never complained to Mr. Koerner? A. If I went to Mr. Koerner and complained, Mr. Koerner would have told my boss, and he would have fired me, and I needed the job.

MR. ROBERSON: Would you read the question back to the witness, please?

Listen, Mr. Hewitt.

(Whereupon the pending question was read by the reporter.)

THE WITNESS: That is right, I didn't complain to Mr. Koerner because they would have me fired.

BY MR. ROBERSON:

Q. You never took it up one way or the other with Mr. Koerner, did you? A. No, I was afraid to.

Q. Now, you had carried egg crates on other occasions on the day of your accident before you actually sustained an accident, hadn't you? A. On the day before?

Q. No, the very day of the accident, earlier that day. You didn't fall the first time you picked up a crate, did you? A. No, we unloaded some by shoving them in the truck. We didn't pick them up at all off the pallets.

Q. Well, you had carried some, hadn't you? A. We carried a few. Maybe the top layer off. I don't remember how many.

Q. You never had any trouble carrying egg crates on any other occasions on that platform, did you? A. I never hauled too many egg crates from there.

Q. I am talking about other days, Mr. Hewitt. You never had any trouble carrying egg crates on any other occasions on this platform? A. I said I never hauled many egg crates from there.

* * * * *

196 Q. That is the first time you had ever seen any egg crates out there, is that right? A. No, I hauled egg crates knocked down before.

Q. But you never had any trouble carrying egg crates before you had your accident, did you? A. I was lucky that I hadn't gotten broken up before.

Q. To answer my question, you had never had any trouble carrying egg crates until you had your accident, had you? A. I never handled many crates from there. And I never had any trouble that day until I broke my leg that day.

Q. Mr. Hewitt, weren't these questions asked you and didn't you answer this way at Page 54 of your deposition, less than two years after the accident:

"Question: Had you carried egg crates on other occasions on that particular day?

"Answer: Oh, yes.

"Question: Was it uncommon to carry two or three egg crates --

"Answer: No, no.

"Question: I am not finished. -- on the platform? Was it uncommon for you to carry two or three egg crates on the platform?

197

"Answer: Well, no.

"Question: Is this the usual procedure?

"Answer: This was usual.

"Question: Did you ever have any trouble carrying these egg crates on any other occasions, empty egg crates on the platform?

"Answer: I can't say that I had trouble."

Were those questions asked and did you answer that way? A. I don't remember.

Q. Now, Mr. Hewitt, did you step off that platform or did you simply lose your balance and fall off it? A. I was carrying the crates off the platform to the truck and I went off of it. I evidently lost my balance. I didn't step off it.

Q. You lost your balance; you did not just step off; am I correct about that? A. I don't remember how I went off.

Q. You don't think you stepped off? A. I was headed for to go in the truck.

Q. Did you just lose your balance and fall off? A. I don't know how I went off, but I went to go into the truck and I fell off.

198 Q. You weren't hit by anybody before you fell off the platform,
were you? A. Not that I know of.

Q. You know you weren't, don't you? A. I don't think I was hit
by anyone, no. I wasn't hit by anyone.

* * * * *

200 Q. Mr. Hewitt, isn't the reason that you fell because you did not
think you were as close to the edge as you actually were? A. I can't
201 say that. I don't know how close I was to the edge.

Q. Weren't these questions asked you and didn't you answer this
way at Page 29 of your deposition:

"Question: Now, when the accident happened
were you stepping from the platform onto the truck?

"Answer: I was going around the edge of the
platform to the truck.

"Question: Going around the edge of the plat-
form?

"Answer: Going around the edge of the pallet.

"Question: Edge of the pallet to the truck.
Could you see where you were stepping?

"Answer: Could you see?

"Question: Yes. Could you see when this ac-
cident happened?

"Answer: Well, I didn't think I was that close
to the edge.

"Question: You didn't think you were that
close to the edge?

"Answer: No."

202 Were those questions asked you and did you answer that way?
A. They were probably asked and I probably answered them that way.
But at that time I was taking stuff for pain and all and I probably
didn't really remember answering that stuff that way. But some of
that is wrong.

Q. And after the deposition was over, you were offered the option of reading it over before it was filed in Court or waiving your signature, and you and your counsel elected to waive your signature, isn't that so, sir? A. I don't remember that.

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204

REDIRECT EXAMINATION

BY MR. KOONZ:

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208

Q. How much room, Mr. Hewitt, did you actually have to load and unload these egg crates that you referred to from this pallet? A. On the ends you had probably a foot, on each end.

209

Q. Now, was this on either end of the pallet as we look at it here? A. It would be on this end and this end, that way, where you are standing.

Q. There would be a foot here? A. A foot there and a foot on this end. Then you had right to the edge, as near to the edge, maybe lapped over a little.

Q. Mr. Hewitt, we have in evidence photographs. On Plaintiff's Exhibit A, do you see in that photograph egg crates stacked on a pallet? A. Yes, sir, stacked right here.

Q. And is this how the egg crates were stacked at the time you were attempting to unload them? A. That is right. They were standing up. They wasn't knocked-down egg crates. Those egg crates are standing up just like the ones we hauled.

Q. Were they in this particular form? In other words, were they in the shape and form that they are in now in this photograph? A. As far as I can see, they are, yes.

Q. Those egg crates that you put on the truck, could they be used again? A. Some of them. The ones that we carried away could be used again.

210

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Q. By use of the photographs that has just been shown to the jury, which has been marked as Plaintiff's Exhibit A, can you tell us whether or not these egg crates at the time of your accident hung over the edge of the pallet? A. Yes, the crates, if they didn't have them stacked up -- these here show to be hanging over.

Q. And is that how they were at the time of your accident? A. Some of them were hanging over more than that.

* * * * *

212 Q. Did you in fact work on one side and Mr. Bailey work on the other? A. You had to. You hardly had room to get on one side by yourself.

Q. That is what you were doing the day of the accident? A. That is what we were doing. We were jammed up so.

Q. When you went to the warehouse in the past, prior to this accident, was this the usual procedure you followed? A. The same
213 thing all the time.

Q. Did one man work on each side of the back of the truck? A. That is right.

Q. Was this fact, to your knowledge, known to Safeway warehouse employees? A. They all knew that.

* * * * *

214 Q.***

Did you haul from other warehouses? A. Yes, sir, I hauled from other warehouses.

Q. Can you tell me approximately how many other platforms you hauled from, other than this one salvage warehouse, in the course of two years?

MR. ROBERSON: May it please the Court, I object to that on the ground that it is immaterial.

THE COURT: Objection sustained.

MR. KOONZ: May I approach the bench, Your Honor?

THE COURT: Objection sustained.

BY MR. KOONZ:

Q. Were the platforms at other warehouses the same height from the ground?

MR. ROBERSON: I object to this line of questioning, Your Honor.

MR. KOONZ: Your Honor, I would like to proffer to the Court why I am pursuing this.

THE COURT: All right.

* * * * *

215 MR. KOONZ: Your Honor, on cross-examination counsel has inquired why he did not carry chocks with him to determine the level of his load or level the truck with this particular warehouse platform.

Now I think we have the opportunity and a right to bring out the fact that since all of these other platforms were different sizes, he couldn't be expected to carry a chock for each and every platform.

I think this is proper redirect examination.

MR. ROBERSON: I have never asked a question in my life, why didn't you do this, unless I knew what the answer was.

I said: You didn't have them, did you?

I don't think what he did at the other warehouses makes any difference.

THE COURT: I sustain the objection.

* * * * *

BY MR. KOONZ:

Q. Mr. Hewitt, when you backed your truck that Saturday morning to the platform, the warehouse platform, was there available to you anything to bring your truck level with the platform?

216 A. No, I never seen anything there that they ever used for anything like that. They never used that.

Q. Now is there in this picture which has been introduced into evidence -- is there a tier leveler or a truck lifter or a chock, as it has been referred to? A. Yes, this truck here has those lifts under it, which I never seen at the warehouse before.

Q. All right. A. This is the first time I have seen them.

Q. Were those chocks available to you at the Safeway warehouse?

A. No, they were not.

Q. The day of your accident? A. They were not.

Q. Mr. Hewitt, when the pallets were brought out that Saturday morning, did you at any time place the pallets behind the truck? A. No, I did not.

Q. Was the pallet that was behind the truck at the time you fell placed there by a Safeway employee? A. They were all brought out that morning by some of the Safeway employees.

Q. When you were finished, would you pick them up and put them back in the warehouse? A. We would pick those pallets up and stack them against the wall.

* * * * *

218 BY MR. KOONZ:***

219 There is a gentleman here under subpoena who is presently the warehouse manager, a gentleman by the name of Newman. I believe his name is Edwin Newman. It is my intent to inquire of Mr. Newman, to show maintenance and control and for no other purpose, the procedures that are followed now in loading and unloading at this warehouse platform.

I am making this proffer for this reason: Since the warehouse -- this is the Plaintiff's position -- was controlled by --

MR. ROBERSON: It is so confidential I can't hear what he is saying.

Will you stand back so I can hear you?

MR. KOONZ: Since the warehouse, admittedly, at the time of the accident, was under Safeway's control, in other words, they could decide what could be put on the platform and what could be removed, it is our contention that they also could have removed at the time -- in order to afford additional space for Mr. Hewitt to work -- these

pallets from the platform, which they have now done. In other words, their whole loading and unloading procedure is different. Since we are attempting to show control of this platform, it is for that reason that I would call this gentleman, Newman, who is here today, to elicit such evidence from him.

I have authority for that position.

* * * * *

220 MR. ROBERSON: Oh, yes, Your Honor. This would be in the nature of a change in system or making repairs after an accident. I think it would be against public policy to show a different system or a different means of operation at this time from what was prevailing at the time of the accident.

Mr. Holmes Koerner was the platform manager at the time of the accident and for some months afterwards. His deposition was taken. If counsel considered that material, he could have gone into it then.

* * * * *

221 THE COURT: Do you propose to show now that the procedures are different than they were at the time of the accident?

MR. KOONZ: I propose to show, Your Honor, that at the time of the accident the Defendant Safeway had control of it and maintained it. In other words, they governed what activity took place on the platform and what manner of physical objects were on the platform. Merely for control. In other words, since they have now changed this procedure, it is evidence of control. They could have done it then and they didn't.

THE COURT: I don't agree with you.

MR. KOONZ: There are cases that allow it.

THE COURT: I don't agree with you.

* * * * *

222 THE COURT: If you have any witnesses who can testify that they had control at the time of the accident, they may do so. The fact that

they have some change in the procedure now I don't think would be admissible for the purpose of showing control at the time of the accident.

226

MR. KOONZ: I would now like to call Mr. John J. Knight.

JOHN J. KNIGHT

was called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOONZ:

Q. What is your present position, Mr. Knight? A. Office Manager, Safeway Stores.

Q. For how long have you been employed in such a capacity? A. In that capacity? I wouldn't know. I have been employed with the company about forty-three years.

Q. But as their office manager? A. About six, eight years.

228

Q. Were you familiar with any company rules that governed the use of that warehouse in 1959? A. I wouldn't know what you mean.

Q. Well, was the warehouse owned by Safeway? Let's start with that. A. You mean, actually, did they have title to the building? Is that what you mean?

Q. Was it under Safeway's control? A. Yes, yes.

Q. Did they have authority to decide what use was made of the warehouse? A. Yes.

229

Q. Did this authority extend to the platform, itself? A. Yes.

230 Q. Was there someone from Safeway at all times in charge of the warehouse? A. Yes.

Q. That could be Mr. Koerner, is that correct? A. That is right.

231 Q. Or this gentleman, Best, that you mentioned? A. That is right.

Q. What was their function, Mr. Knight, at the warehouse? What was their job? A. Their job was to manage the place.

Q. Did this job as manager of the warehouse include the direction or control of what activity took place in the warehouse? A. Yes.

Q. This was part of their job. Did this control govern the platform, itself? A. Yes.

Q. For example, from your own personal knowledge of the operation there, would it be the job of any one or all of these gentlemen to decide what materials were placed on the platform? A. I don't quite understand what you mean. They were in charge of it and they were to keep the thing moving. That was it.

Q. If there were, for example, pallets placed on the platform, would this be under their control? A. Yes.

232 Q. If there was any material loaded on the platform in a stationary position, that is, not being moved in or out of the warehouse, would this be under their control? A. Yes.

* * * *

233 PAUL F. GAY

was called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

234 DIRECT EXAMINATION

BY MR. KOONZ:

* * * *

Q. From those records, do you have information as to the number of days that Mr. Hewitt was in the Washington Hospital Center? A. Yes.

Q. Would you tell us what these dates were?

235 A. He was admitted January the 10th, 1959 and remained until September 2, 1960.

He was again admitted March 12, 1961 to April 3, '61.

Again on March 6, 1962 to March 30, 1962.

His last admission was from September 13, '62 to November 16, '62.

* * * * *

MR. KOONZ: At this time I would like to renew my request to present safety expert Mr. Newman, to testify to the safety aspects of this platform.

THE COURT: I don't know what you mean by that.

236 MR. KOONZ: Well, initially, as Your Honor recalls, Your Honor refused to allow the Plaintiff to present expert testimony. Merely for the record I am renewing the request.

THE COURT: Is he here?

MR. KOONZ: He is within five minutes.

THE COURT: Oh, he is one of those that you requested?

MR. KOONZ: Yes, I want to make that clear.

THE COURT: Very well, I will make the same ruling. I will deny your request.

MR. KOONZ: Your Honor, I also have in the witness room -- and I want the record to be clear, these gentlemen's names had not previously been supplied to counsel for the Defendant -- a gentleman by the name of John Owens.

MR. ROBERSON: Who?

MR. KOONZ: John Owens, O-w-e-n-s. And a gentleman by the name of Raymond Best, B-e-s-t. And another gentleman whom I believe I have referred to earlier, a man by the name of Newman, not the same Newman as the safety expert, but another Newman, who is presently the supervisor of the warehouse.

238 * * * * *
 THE COURT: Do you object to these witnesses?

MR. ROBERSON: Yes, Your Honor, on several grounds: Number one, they are not included in the names of the witnesses that were supplied me pursuant to the pretrial order. There is no reason given why they weren't.

240 * * * * *
 THE COURT: Would you be prejudiced at all by this?

MR. ROBERSON: Yes, Your Honor. I don't think he ought to be coming in at the end of the Plaintiff's case and springing three witnesses on me.

242 * * * * *
 THE COURT: Do you want me to take a recess so you can talk to these witnesses? They are employees of your company.

MR. ROBERSON: If Your Honor is going to permit them to testify, I would like to talk to them, but I don't think he has made a showing of why they should.

THE COURT: I am inclined to think he has.

MR. ROBERSON: To prepare a case with the witnesses eight years after the accident.

THE COURT: He has persuaded me this is a development during the course of the trial which makes it appropriate for him to call them.

243 * * * * *
 RAY J. BEST

was called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOONZ:

Q. Mr. Best, would you kindly state your full name? A. Ray J. Best.

* * * * *

244 Q. In January of 1959, were you employed by Safeway at that time? A. Yes, sir.

Q. What was your capacity for Safeway? A. Shipping receiving clerk.

Q. And where was your actual work activity located? A. At the salvage warehouse at that time.

Q. What were your duties, Mr. Best, in that capacity? A. Shipping, receiving, consisting of counting merchandise leaving the platform.

Q. Now, were there others in charge of the warehouse in addition to yourself? A. Yes.

* * * * *

245 Q. Were you employed by Safeway at the warehouse on or about or prior to January 10, 1959? A. Yes, sir.

Q. Mr. Best, at that time, that is, prior to January 10, 1959, what were the warehouse instructions with regard to the use of the platform? A. The platform at that time was used for unloading trailers. The trailers would come back from the stores. They would have returns on them. We had pallets laying on the dock for unloading trailers.

246 Q. Would you come down here, please, Mr. Best, and tell us if you recall if this is a fair representation of how the platform would look?

(Whereupon the witness left the stand.)

A. Say this pallet here was up against a wall.

Q. Like this one is here? A. Yes, sir. Let me look at it that way.

Q. If this was the warehouse, itself -- A. Say this is the wall right here. This pallet would be up against the wall.

Q. And would this pallet be lying on the deck? A. Yes, sir.

Q. and would these be in a stacked position most times? A. Just like they are laying, the same.

Q. Now, if there was a truck being loaded with material from the warehouse, where would that pallet be placed? A. If the pallet was being loaded by a man hauling merchandise, it was supposed to be stacked in a pile when they are finished.

247 Q. If someone was coming to the warehouse to pick up empty boxes from the warehouse, and these boxes were brought from the warehouse by pallet, where would the pallet be placed?

For instance, the truck that is loading the merchandise would be here. Would that be right behind the truck? A. This is your dock here, your loading dock.

Q. Yes. A. Your tractor-trailer would be backed up here. There is a space here where you run your pallet up here for loading purposes over here.

Q. You have indicated the space here was for running pallets. A. Say the trailer is loading over here or unloading. The man would have room to load his truck or trailer or unload the same.

Q. Now, would that man be allowed to stand in the aisle? A. Yes, sir.

Q. If trucks were going back and forth, could he stand in the aisle? By trucks I mean the hand trucks that are used. A. The hand jacks, yes, sir.

THE COURT: What did you say, sir?

THE WITNESS: Yes, sir.

248 BY MR. KOONZ:

Q. Now, was it the instruction of Safeway to keep that aisle open at all times? A. Yes, sir, because we had men working there back and forth all the time.

Q. Mr. Best, would you return to the stand. A. Certainly.

(Whereupon the witness resumed the stand.)

Q. If the aisle was blocked what would the result or effect on the warehouse be? A. Well, the operation would be stopped practically.

Q. So was it -- A. We have men unload the trailers and load the trailers and the dock has got to be open at all times.

Q. Mr. Best, let me ask you this: Are you familiar with this gentleman seated here, Mr. Hewitt? A. Yes, sir.

Q. Do you know who he is? A. Yes, sir.

Q. Do you recall that he used to come to the warehouse? A. Yes, sir.

Q. Do you recall that he worked for Atlantic Box and Basket? A. Yes, sir.

249 Q. When an empty Atlantic Box and Basket truck would come to the warehouse and pick up empty egg cartons, for example, where would these egg cartons be with regard to the warehouse, itself?

A. The egg cartons would be inside in the storage.

Q. What would the gentleman such as Mr. Hewitt do when he arrived? In other words, what was the established procedure that he would follow? A. He would go to the shipping receiving clerk.

Q. Which would be your office? A. Yes, sir.

Q. Or Mr. Koerner's? A. Right.

Q. Then what would he do? A. He would tell him what he wanted.

Q. Then what would you or Mr. Koerner do? A. We would have a man in the warehouse bring out the crates or boxes.

Q. You would have the man, a Safeway man? A. Certainly.

Q. And would that Safeway man then place the pallet behind the truck? A. That is right.

250 Q. Mr. Best, when you were in charge there or under Mr. Koerner and Mr. Bastin, did you have complete control over the platform, itself? A. At times, yes.

Q. Was it your duty or part of your function to decide what was placed on the platform? Was that part of your job? A. Well, for example, what?

Q. Well, if, for example, pallets were stacked on the platform as you have indicated, would this be something that was done with your permission? A. If he is finished unloading his truck or loading his truck, he would probably have five or six pallets stacked up here in one stack. It is up to our man to move those pallets and put them on a trailer.

Q. Now, were there times, do you recall, in 1959, in fact, was this not the usual procedure to stack the pallets once they were unloaded back on the platform, itself? A. That is our procedure, yes, sir.

* * * * *

251 THE WITNESS: It is up to the man that is loading or unloading to stack his own pallets. For example, if we have a buyer come in, he wants a crate of lettuce crates or a pallet, he empties that pallet, he moves that pallet back in out of his way and stacks it.

BY MR. KOONZ:

Q. To keep the aisle open? A. Right.

Q. And was that your instruction? A. That is right.

Q. These areas had to be kept open? A. Yes.

* * * * *

CROSS EXAMINATION

BY MR. ROBERSON:

Q. Mr. Best, were you there on Saturday, January the 10, 1959, when Mr. Hewitt was injured? A. No, sir.

Q. Was Saturday your day off? A. Yes, sir.

Q. On Saturdays, did you have fewer men out there at the platform than you did on weekdays? A. Saturday is mostly a clean-up day. Very few men on Saturday.

252 Q. Very few men? A. Yes, sir.

* * * *

253 JOHN OWENS

was called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KOONZ:

Q. Mr. Owens, would you be kind enough to state your full name and your present address? A. John Owens, 1732 A Street, Southeast.

Q. And by whom, sir, are you employed? A. Safeway Grocery Company.

Q. How long have you been employed by Safeway? A. Twenty-one years.

Q. Mr. Owens, in 1959, some time ago, January of 1959, were you working for Safeway then, sir? A. I were.

Q. Do you recall where you were working for Safeway? A. I am a helper on the trucks.

* * * *

254 Q. You could work all over? All over the warehouse area you could work? A. Not the warehouse. Like in the District or Alexandria, somewhere like that, you take a load out.

Q. Did you on any occasion work at the salvage warehouse in Landover? A. I work down there, when you bring your returns in, you unload them.

Q. Do you remember working there in 1959? A. Yes, I works there.

Q. Do you recall a gentleman by the name of Koerner? A. Who?

Q. Mr. Koerner or Kerner. A. Oh, yes, yes, I do.

Q. Was he your boss at the time? A. Well, he was the foreman at the salvage department. When you unload your returns, he would be down there.

Q. Now, when you were there at the warehouse, do you remember what it looked like, the platform, itself?

Can you recall that, Mr. Owens?

* * * * *

256 Q. Mr. Owens, you can see this area here? A. Yes, I can see it.

Q. Assuming this was the warehouse -- A. Uh-huh.

Q. -- is this how the pallets were stacked on the warehouse platform? A. Yes, they be like that, but that one is turned the opposite way for to use it.

Q. It should be turned the other way? A. That is right. When you move the other one, it fall down, be right.

Q. Would there be some pallets stacked in front of this one for use? A. Sometime.

257 Q. Now, Mr. Owens, you remember this gentleman, Koerner, do you not? A. I do.

Q. In fact, you have quite a sense of humor, haven't you? A. (Witness laughed.)

Q. Do you recall at the time you were working out there when Mr. Koerner was in charge and instructions that the Safeway had for the use of that platform? What rules they had about the platform?

A. He would always tell everybody to keep the platform clear at all times.

Q. What did you do when you used to hear him say that? A. I would laugh and sometimes when I see him, I would say it to the men before he get there.

Q. What would you say? A. I'd say: "Keep the platform clear at all times, fellows."

Q. Why did you keep saying that, Mr. Owens? A. I just say it for fun, that was all.

Q. Is that what Mr. Koerner kept telling everybody?

258 A. He would always say: "Keep the platform clear at all times."

That is all. That was just the words he had to say.

Q. How did you understand that? In other words, what did that mean to you when he kept saying that? A. Well, if you bring something in there, you take it inside, don't leave it out there.

Q. Well, would you have to keep the aisle clear for pallets going back and forth? Was that one of the rules? A. Well, if you keep it clear, you don't have no trouble or anything.

Q. Was that one of Mr. Koerner's rules, to keep the aisle open at all times? A. That is what he would say to you.

Q. Can you describe for us, if you recall, Mr. Owens, the working conditions on the platform in 1959? A. Working conditions was good in '59 because it was light to what it is now.

Q. Did you have sufficient room to carry on your work when you were working on the platform? A. Yes. At times we be a little crowded but not too often, not in '59.

Q. Were there times when it got crowded? A. Not too much.

259 Q. When the pallets were in the warehouse with, say, for example, egg cartons on them, how would these pallets be brought from the warehouse, for example, to be used by Mr. Hewitt to make his choice? A. Was always somebody work there would pull them out with a jack.

Q. And who would that person be working for? A. He would be working for the Safeway.

Q. Was that the procedure at the warehouse? A. Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. ROBERSON:

Q. Mr. Owens, were you present on Saturday, January 10, 1959, when Mr. Hewitt was hurt out there? A. No, sir.

Q. You just heard about it the following Monday? A. That is all.

Q. Is that the first time you ever heard of anybody being hurt off that platform? A. That is the first of my knowing of anybody getting hurt.

260 Q. And on Saturday, was the working crew out there smaller than it would be on weekdays? A. Yes, sir.

Q. Do you know why that was? A. Well, the most of the fellows are off on Saturday if they have been there any length of time.

Q. Was Saturday your day off? A. Yes, sir.

Q. You don't know whether on Saturday Mr. Hewitt would have to go in the warehouse and bring the egg crates out himself or whether a Safeway man would do it, do you? A. No, I really don't.

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262 MR. ROBERSON: This is dated:

"Washington, D. C.

"Wednesday, October 5, 1960

"Deposition of JOSEPH BAILEY,

* * * * *

264 "EXAMINATION BY COUNSEL FOR THE DEFENDANT

"BY MR. COLLINS:

"Q. State your full name, please.

"A. Joseph Henry Bailey.

"Q. Where do you live Mr. Bailey?

"A. 1113 Harvard Street, N. W.

"Q. Are you employed, Mr. Bailey?

"A. Yes, I am.

"Q. Who are you employed by?

"A. I am employed by James Lolendale.

* * * * *

"Q. What do you do for him?

"A. Everything. Truck driver, loading and unloading the truck."

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"Q. Mr. Bailey, I'd like to ask you some questions about an accident that occurred on January 10, 1959 at a Safeway store.

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"Q. For whom were you working at that time?

"A. I don't know what it's got now; the Atlantic Box and Basket Company or the Acme. One of the names, I recall it.

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"Q. Was the truck backed up and --

"A. The truck was backed up and parked right at the platform.

"Q. Was it flush with --

"A. It was parked flush with the platform.

"Q. After it was parked flush with the platform what did you do?

"A. Started loading egg crates on it.

"Q. What did Mr. Hewitt do?

"A. He did the same thing.

"Q. Where did you get the egg crates from?

"A. From inside the building. They were pulled out on a skid and a jack.

268

"Q. Who pulled them out?

"A. Well, that particular day, I couldn't say.

"Q. Do you know whether you did?

"A. Well, it was Monday or Saturday, you have to haul out your own, and the other days of the week they bring it out for us.

"Q. Now, did there come a time when you got the truck all loaded?

"A. Yes, it was.

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"Q. Now, can you tell me what happened?
Tell me how the accident happened.

"A. Well, we got the truck loaded and generally we try to carry all we can get on the truck as possible. After we got it on there -- it was a windy day -- and he was tying up the back of the truck to --

"Q. Who do you refer to when you say, 'he'?

"A. Bill, we call him. I never did know his last name.

"Q. He was the driver of the truck?

"A. Yes, the driver.

"Q. In other words, he was the one you went there with?

"A. Yes, sir. He was tying up the gate after we got the egg cases with a rope, and the wind was blowing the egg crates off the truck. They are made of cardboard, and I was trying to help him hold them on, and the next thing I know, he started to tie up the back of the truck, and I must have turned around to light a cigarette, and the next thing when I looked he was down off the platform on the ground on his knees with a rope in his hands.

"Q. You saw a rope in his hands?

"A. Yes.

"Q. Was the rope in his hands broken?

"A. Yes, sir.

"Q. Where was the other piece of rope?

"A. Attached to the truck."

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* * * *

"Q. Did you ask Bill -- that's Bill Hewitt -- how the accident happened?

"A. No, I seen the rope was broke and he was down on his knees and couldn't get up.

"Q. Was he down on his knees beside the truck?

"A. Right on the ground. When he was tying the rope he was standing on --

"Q. On the platform?

"A. Yes, he was.

"Q. Was he up very near to the truck?

"A. He had to be right at the truck when he was tying it up.

"Q. And how far were you away when he was tying the rope?

"A. I don't know. Possibly three or four feet, maybe.

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273

"Q. Now, when you say you turned around to light a cigarette you heard him fall -- did you hear him fall?

"A. No, when he hollered, that's when I turned around and he was on the floor.

"Q. About how long had you been turned around?

"A. Oh, I don't know. Most of the fellows I know by name, and while a truck is loading, I will walk over and go to the bathroom or get a drink of water, or I'd be busy myself loading.

"Q. But when you turned around to look at Bill Hewitt, did you see anyone with merchandise on the skid near the back of the truck?

"A. No, there wasn't.

"Q. There was nobody there?

"A. No.

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"Q. Did you ever notice anybody driving or pushing or pulling one of these skids?

"A. I imagine there was.

"Q. I mean in this area?

"A. Yes, but not near us, they wasn't.

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"Q. At any time have you seen anybody use these skids?

"A. Yes. Well, whoever brought the boxes out to us evidently had to pull them out to us.

"Q. So they did use a skid to bring them on?

"A. Oh, yes.

"Q. Have you ever seen anybody pulling them fast or pushing them fast?

"A. No, they can't do that.

"Q. Well, have you ever had to get out of the way of one of these skids as it was going by?

"A. Oh, yes, many a time.

"Q. Well, the platform is rather narrow, isn't it?

"A. Yes, sir.

"Q. And if there was another skid on the platform there wouldn't be too much room for somebody else on there, or would there?

"A. Well, if the sides are pulled five-high or ten-high against it, otherwise there is enough room for a man to come by with a jack with a skid on top of it."

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"Q. Now, if there was a skid -- if there were skids piled on the platform and another skid being used on the platform, would there be much room for another man on the platform?"

"A. Just about.

"Q. There wouldn't be very much room?"

"A. No, just about enough.

"Q. Now, you have stated, Mr. Bailey, that you didn't actually see Mr. Hewitt fall, is that correct?"

"A. That's right.

"Q. And you turned -- that you turned around to light a cigarette?"

278

"A. Uh-huh.

"Q. Approximately how long had you turned away from Mr. Hewitt before you heard him yell?"

"A. Oh, it couldn't have been more than a minute, two minutes.

"Q. But in that time could someone else have driven a skid or pulled a skid out on the platform?"

"A. No, they couldn't because if they did I would have to move out of the way for them to get by.

* * * *

"Q. However, you didn't notice another skid in the area?

"A. No, sir.

* * * *

279 "Q. So you don't actually know how it happened?

"A. All I know is what I told you.

"Q. Then you don't know how he fell from the platform?

"A. No.

* * * *

282 "Q. Did you have any trouble with them prior to it -- were you having trouble loading the egg crates?

"A. Yes, we did.

"Q. Because of the wind?

"A. The wind.

"Q. Wouldn't you say it was rather tricky business, so to speak, working around there?

"Was there danger that the egg crates would blow away and there was --

"A. They were blowing all the time.

"Q. Sort of general confusion?

"A. Uh-huh.

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287 MR. ROBERSON: Deposition taken at Washington, D. C., Thursday, June 24, 1965.

"HOLMES KOERNER

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288

"EXAMINATION BY COUNSEL ON BEHALF OF DEFENDANT

"BY MR. ROBERSON:

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"Q. What type of job did you have with Safeway in 1959?

"A. Foreman, Salvage Warehouse.

* * * *

"Q. Were you a witness, Mr. Koerner, to an accident that Mr. William Hewitt, who sits here, had at the salvage warehouse on January 10, 1959?

"A. Yes.

* * * *

"Q. And where were you at the time of the accident?

"A. Approximately 20 feet from where it actually occurred.

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"Q. Now you say you actually were an eye witness to Mr. Hewitt's accident of January the 10th, 1959?

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"A. That's right.

* * * *

"Q. Would you tell us, Mr. Koerner, what you observed with respect to Mr. Hewitt's accident as you were standing there in that position? What did you see?

"A. They had loaded a truck with egg crates, pasteboard egg crates.

"MR. KOONZ: May we identify who had loaded.

294

* * * *

"A. Mr. Hewitt and a man that he had along with him, who I don't know.

* * * *

"Q. I don't want you to guess. What did you see happen?

"A. I stood there in the door from the time that it was practically loaded until it was finished loaded and they were roping the pastboard egg crates on the truck so that they would not blow or fall off in transit between the salvage warehouse and the Atlantic Box and Basket Company.

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"Q. And what did you see?

"A. I saw Mr. Hewitt tying his load on with a rope and he lost his balance and he went down to the road.

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"Q. Had the loading operation been completed except for tying the load on at the time of Mr. Hewitt's accident?

"A. The truck was completely loaded when he lost his balance and went down.

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"Q. Mr. Koerner, did anyone come along the platform with a cart or in any other manner crowd Mr. Hewitt off the platform?

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"A. Where Mr. Hewitt's truck was and had been loaded, there was very little traffic in that particular section of the platform.

"Q. Well, in response to my question, did anybody come along as he lost his balance and push him off?

"A. Oh, no, the answer to that is, no.

"Q. Was the platform cluttered in the immediate vicinity of where Mr. Hewitt fell off the platform?

"A. Definitely not.

"Q. You have approximated the width of the platform at about 15 feet. Would it have made any difference had the platform been wider than it was as to have this accident happen?

"A. I would say that the width of the platform wouldn't have made any difference in this instance because he lost his balance from the edge of the platform regardless of the width of the same.

* * * *

307

"Q. Now, Mr. Koerner, at the time of this accident or at any time prior to the accident were there in use pallets for the loading of material on the platform, itself?

"A. Pallets were constantly in use.

"Q. In fact, they were constantly on the platform, were they not, piled on the platform?

"A. Being maneuvered one way or the other, yes."

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"THE WITNESS: This is a replica of the system used, referring to pallets.

"Q. Now, does not the photograph show pallets standing upright against the wall, the outside wall of the warehouse itself?

"A. Yes, but never more than one standing up against the wall.

"Q. Now, what is piled in front of that one upright pallet?

"A. Empty pallets as a rule.

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"A. The routine is just as you see this photograph here. One pallet against the wall standing upright only, the balance laying flat in front of it.

"Q. Now were there pallets stacked in this very manner at the sight of Mr. Hewitt's fall on the platform on the day he fell, if you recall?

"A. I don't know.

"Q. Was it the policy of yourself and the Safeway salvage warehouse on January 10th, 1959 to stack the pallets in the same manner as they are shown in the photograph?

"A. That is the routine way of stacking pallets.

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"Q. More specifically, Mr. Koerner, did you instruct Mr. Hewitt and other drivers and in fact insist upon a pathway being kept clear in the middle of the platform, so that dollies and trucks and pallets could be moved up and down the platform?

"A. If the pallets were placed according to instructions, there was always room for maneuverability either up or down the platform without going over the platform or extending over the platform.

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"Q. Were you telling each of these drivers from time to time, new ones, old ones, Mr. Hewitt included, to place the pallet they were using, either to unload or load, as close to the edge of the platform, that is, the outside edge, as possible so as to

keep a pathway clear in the center of the platform?

"A. I would say, no, I've never used those exact words.

"Q. Well, what words did you use, sir?

"A. That you would have to allow room in the middle of the platform for maneuverability sake. Secondly, it was to his advantage to get that pallet load of crates, baskets, salvage items close to his truck to save him time and from carrying them a further distance.

319

"Q. Was it not also for the purpose of that instruction to these various drivers so that you would have ample room on the platform so that other pallets could move between the pallet that was being used at the edge of the platform and the pallets that were stacked against the building?

"A. That was routine to make the platform maneuverable, either up or down.

"Q. And did you at any time or do you recall telling Mr. Hewitt, specifically, that these were the instructions or that this was the rule of the salvage warehouse?

"A. I don't remember of every time Mr. Hewitt asked specific instructions, but I've also already said that new men, whether they were Safeway employees or outside employees, were told the function of the platform, and I don't think Mr. Hewitt was an exception.

"Q. In other words, he was told at some time that this was the rule?

"A. I think so, yes, sir.

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"Q. Well, Mr. Koerner, when a pallet was in use, either being loaded or unloaded from a truck or onto a truck at the edge of the platform, is it not a fact that that pallet would be placed next to the truck, in a position whereby the short end or the front or back end would be facing the back of the truck or the opposite end would be facing the wall of the warehouse?

"A. If that happened, that would be an exception.

"Q. Isn't it a fact that it did happen?

"A. The routine was that the pallet, the longer part of the pallet should be with the length of the platform.

"Q. Well, isn't it a fact?

"A. For more than one reason it made contents of the pallet more easily accessible to the man that was unloading the pallet.

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"Q. Now when the jack was placed under a pallet, it had to be placed on or under either end, in other words, from either end, not on the side?

"A. That's right. And I would add to the remark about the side, you couldn't put a jack under the side of the pallet because the jack could not get through the entire side of the pallet.

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"Q. So when the pallets were lifted, they were lifted with the use of this jack on either end of it?

"A. That's right.

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"Q. Assuming there is only one pallet on the platform that's loaded with material and you want to move that from one part of the platform to another or from the platform into the warehouse, is it not a fact

that the lift truck would have to pull up to the pallet and face the building?

"A. That's correct. That is correct.

"Q. Now, isn't it also a fact that these pallets cannot be lifted from the side?

"MR. ROBERSON: He so testified already.

"THE WITNESS: With a jack, the answer is, no.

"Q. Now, when these pallets are being used by the truckers, by the various drivers, is it not a fact that they are placed in such a manner on the platform so that the end of the pallet faces the back of the truck?

"A. When a pallet is being unloaded, the side of the pallet would be next to the truck, for reasons I have already explained. It means that the whole contents of the pallet would be more accessible and easily -- easier to handle.

* * * * *

328

"Q. There were trucks at the time of Mr. Hewitt's accident and prior to his accident backed up to the platform side by side?

"A. Quite often.

* * * * *

331

"Q. Would there be room, sufficient room for another pallet to be moved between the two flat pallets on the platform?

"A. I would just have to repeat myself. If that is the case, as you explain it as to inches or feet, it would be an approximation but there would be sufficient room for maneuverability either up or down the platform.

* * * * *

"Q. How much room?

332

"A. Approximation?

"Q. If you choose.

"A. My approximation would be that you could measure it in inches on both sides.

"Q. By inches?

"A. You would have inches clearance on one side and you'd have clearance on the other side. Whether that would equal together a foot or more, I can't answer definitely.

* * * * *

335

"Q. Was there a pallet on the platform which Mr. Hewitt had been using or was using, placed against the back of his truck at the edge of the platform at the time of the accident?

"A. I don't know.

"Q. And you are certain that he fell on the driver's side of the truck?

"A. The steering wheel side, that is the way I have described it previously. That still stands.

* * * * *

343

THE COURT: Do you have any rebuttal?

344

MR. KOONZ: Yes, I do. I am going to once again request of the Court, in rebuttal, to present Mr. Newman, the safety engineer, safety inspector.

THE COURT: I will make the same ruling I made before as to the same witness.

MR. KOONZ: I assumed that that ruling was for the plaintiff's case-in-chief. This is rebuttal.

THE COURT: You say, Mr. Newman. Is he the employee of Safeway?

MR. KOONZ: There are two Newmans.

MR. ROBERSON: This is one of the two experts he has been talking about.

THE COURT: I will make the same ruling.

* * * * *

348

Washington, D. C.
October 13, 1966

* * * * *

349

MR. ROBERSON: Yes, Your Honor.

May it please the Court, at this time, at the conclusion of all the evidence, I move for a directed verdict in favor of the Defendant on the following grounds:

Number One, there is no substantial evidence of negligence on the part of the Defendant Safeway.

Number Two, even if there were, that it is clear from the record that the Plaintiff is barred from recovery by contributory negligence and, thirdly, by his assumption of risk as a matter of law.

* * * * *

364

MR. KOONZ: Good morning, Your Honor.

May it please the Court, I think that in order to approach this as it should be approached, in any case of this nature, when the Court is faced with a motion of this nature, the facts, themselves, of course, are controlling and determine whether or not the motion should be granted.

* * * * *

365

Irrespective of that, on the merits of the case and the law and the evidence that was presented to you, Your Honor, the one controlling, as we see it, situation that differs this case from any that the Defendant has presented — and I will soon distinguish those case — and it was admitted constantly by all of the witnesses, is this: This Defendant controlled, had complete control of this platform. They forced this plaintiff to work where he was working. This has not been disputed, Your Honor. This has never been contradicted. Every one of them said, in

addition to Mr. Hewitt, he had to work near the edge, they had to keep the aisle open, he had to put his pallet near the edge. So they forced him, their regulations put him in this position.

THE COURT: He knew that, didn't he?

MR. KOONZ: He did know it and we can't deny that he knew it, but he had to do his job. Now the question is, in order to do his job — let's assume that he said, I am not going to put my pallet near the edge, I am going to put it out in the aisle. You heard his testimony. It hasn't been contradicted. He said if he started complaining about the working conditions, he probably would be fired. He admitted he knew it. He knew he had to work near the edge. But since the Defendant Safeway had control of this platform, all they had to do — and I submit this is a factual jury question — was remove one of those pallets against the warehouse wall and take it inside. One of the witnesses said there was room inside for pallets. In other words, it would have given him a whole extra four feet within which to work so he could have moved his pallet back.

* * * * *

371 THE COURT: Don't employees frequently have to work under
dangerous conditions and isn't that the reason we have Workmen's
372 Compensation Insurance?

In this case, as I understand it, Mr. Hewitt is covered by Workmen's Compensation and his doctors' bills and hospital bills have all been paid, haven't they?

MR. KOONZ: This is true; it is true; but I would hope —

THE COURT: I have every sympathy for his problem because he hasn't been compensated for his pain and suffering. That is a problem. I know that. But he is fortunate in having this Workmen's Compensation that provided so much protection for him and that is the purpose of it.

MR. KOONZ: It does and it doesn't. He only has so much. In other words, in this particular — well, at the time he was hurt in 1959,

the most benefits he could get was \$17,280. Now, I would prefer not to —

THE COURT: That is the benefits he can get.

MR. KOONZ: That is right.

THE COURT: That doesn't include medicals and hospital.

MR. KOONZ: That has all been taken care of.

Let's take a look at the Vulcan case cited by the Defendant. This involves an accident on a construction job. The courts in Maryland make quite a distinction in this area. They have said, the very nature of the work on a construction job, since you are building something —

373 THE COURT: What I am asking you to help me with, and I am sincere about this, is some Maryland law that shows the distinction that I can follow.

* * * * *

381 THE COURT: What do you say about his contention, as I interpret it, that the Plaintiff did not assume the risk because he was compelled to accept the conditions laid down by the Safeway or not work there at all?

MR. ROBERSON: That is what assumption of risk is. He understood the situation. He or his employer wanted him to go there to work under known conditions. He had the alternative of not coming or changing jobs. That is what all assumption of risk cases are, Your Honor. You have the option of accepting a known risk or doing something else. That is not a reason for not applying the doctrine, since in this case there is no dispute that he did know what the situation was and had known it for two years and it was no different this time. The policy of the company hadn't changed after he got there; it didn't change this day, that they suddenly made him work over close to the edge of the thing.

So far as Safeway was concerned, if he didn't want to work under those conditions, he shouldn't have come there, and having come there, he assumed the risk of working under the known conditions and under the known rules that were in force at that platform because he knew it,

382 they knew it, and that is what assumption of risk is. There isn't any dispute for the jury to decide on that. He admits himself he knew it.

* * * * *

383 **THE COURT:** Mr. Koonz, I am sorry, I can't agree with you. I am of the opinion that there is no genuine issue of fact at all with respect to the assumption of risk. I don't think it is a fact question on assumption of risk. I think as a matter of law the Plaintiff did assume the risk and that, therefore, as a matter of law the Plaintiff cannot recover.

I think there is a case to go to the jury on the matter of negligence or contributory negligence, but on assumption of risk I find nothing to give to the jury.

MR. KOONZ: Your Honor, would the Court consider allowing it to go to the jury —

THE COURT: I meant to ask you, Mr. Roberson. I would like to get your views about this. You are well aware of the views of our Court of Appeals that on many circumstances the trial court should submit it to the jury and reserve for the purpose of passing on n.o.v. if the jury returns a verdict, or in light of the situation as it develops after the

384 jury verdict.

What do you say about that?

MR. ROBERSON: Your Honor, I think the cases that they say should go to a jury are where there is some question about the law or what the facts are. Here, at least so far as assumption of risk is concerned, there isn't any question of fact. It is purely a question of law. I don't think it ought to go to the jury. Your Honor would be compelled, duty bound, with Your Honor's view, to set it aside.

THE COURT: That would give the Court of Appeals an opportunity to reverse me and if it did reverse me we wouldn't have to have a new trial.

MR. ROBERSON: It would give them an opportunity to hide behind the jury's action, too, and with all due deference to the Court of Appeals, it is pretty easy to see —

THE COURT: You are speaking for the record.

MR. ROBERSON: That is the reason I hate to speak on this subject. If all judges were as courageous as Your Honor, and many of them on the Court of Appeals are, I wouldn't have any difficulty; but I think it is Your Honor's duty to do your duty and that is what I am asking at this time.

385 THE COURT: I think I have the responsibility to decide the case, in view of my conviction as I have expressed it.

I have considerable sympathy for Mr. Hewitt and I am gratified by the knowledge that many of his problems are taken care of by Workmen's Compensation. It is certainly very fortunate we have Workmen's Compensation in this case. I recognize that he is not being fully compensated for the injuries he sustained, the permanent injuries he sustained and the pain and suffering he has had, and all the other things, but I think as a matter of law I have to rule as I have indicated.

MR. KOONZ: Your Honor —

THE COURT: I do it reluctantly, frankly.

MR. KOONZ: — so that I might be fully apprised in proceeding further with this case, may I have the Court's rationale on the assumption of risk here as the facts apply here?

THE COURT: I think it is clear that Mr. Hewitt was aware of the conditions that existed at the time he was working there. He knew of those conditions, knew just as much about them as Safeway did; and I think that the principle of law stated in this Acme Paper Company case is clearly applicable.

386 MR. KOONZ: Isn't the Court saying that his alternative was not to work there?

THE COURT: I think so, yes.

MR. KOONZ: Is this not an unfair burden upon this Plaintiff?

THE COURT: I don't think so at all. I think that is one of the things we have in many cases of employees working under dangerous conditions. They either have to put up with the dangerous conditions or they don't work there. It is as simple as that.

* * * * *

[Filed October 21, 1966]

**DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR A NEW TRIAL**

Plaintiff's Motion for a New Trial urges four grounds in its support. However, since the first three points dealt only with details of the trial which had no bearing upon the directed verdict, only that point is of consequence on this motion.

1. Directing a verdict upon the ground of assumption of risk was required under Maryland law.

Defendant filed a written memorandum citing La Vonas v. Acme Paper Board Co., 184 Md. 16, 40 A. 2d 43, ten other Maryland cases, and Restatement of Torts to the effect that plaintiff could not recover because he had assumed a risk which was as obvious to him as to the landowner. Plaintiff was then unable, and still has not, produced any valid distinction between those cases and plaintiff Hewitt's situation. Several of them involved situations where there was no contractual relationship between the injured plaintiff and the defendant, so plaintiff Hewitt's memorandum shows no distinction on that ground (plaintiff's memo. p. 10).

The cases cited in Section IV of plaintiff's memorandum all involve actions by defendant or third persons which created a "hazard not naturally incidental to the situation" (plaintiff's memo. p. 7, 9, 10, 11). Plaintiff Hewitt was the sole actor in causing his fall off the edge of the loading platform. The width of the platform and the working conditions thereon were unchanged for the two years preceding his accident, during which he averaged a trip a week. It is therefore clear that the so-called "hazard" was "naturally incidental to his situation" and as well-known to plaintiff as to defendant. No third person, nor even second person, acted in such a way as to make the situation on the day of his injuries different from any other day. His was simply an industrial accident for which, fortunately, the workmen's compensation relief which he is receiving was designed. He has no further, or other, remedy.

2. Failing to declare a mistrial due to mention in defendant's opening statement that the pleadings showed a change of theory was not error.

On the contrary, pleading by authorized counsel which is contrary to plaintiff's contention at the trial, is an admission which defendant should have been permitted to show as evidence of what plaintiff's authorized counsel at one time "claimed" defendant's negligence consisted. See Jelleff v. Braden, 98 U. S. App. D. C. 180, 186, 233 F. 2d 671, 677 (1956). The evidence should have been admitted and plaintiff's counsel permitted to explain, as best he could, why his firm switched to an entirely different theory of negligence after depositions showed there was no factual support for the original claim. However, the matter is immaterial on the present motion because it had no bearing on the correctly entered directed verdict.

3. Refusing to permit plaintiff to introduce evidence from two expert witnesses whose names had not been timely submitted was both correct and immaterial on this motion.

The directed verdict grounded upon assumption of risk would have been correctly entered, irrespective of what the surprise witnesses might have opined. Moreover, their opinions being upon a non-technical matter would not have been admissible anyhow. Kenney v. Washington Properties, 76 U. S. App. D. C. 43, 128 F. 2d 612. Moreover, judge Corran's refusal to let an expert testify whose name had not been timely supplied in compliance with the pretrial order was approved in Kelley v. Safeway, 105 U. S. App. D. C. 406, 267 F. 2d 683 (1959).

4. The court correctly refused to permit evidence of post-accident changes, because to have done so would have violated public policy.

The rule that subsequent repairs cannot be shown to show negligence is said to be "now universal." Altemus v. Talmadge, 61 App. D. C. 148, 152, 58 F. 2d 874, 878 (1932). Plaintiff's memorandum claims the evidence was admissible to show control of the platform (plaintiff's memo. p. 5). Apart from the public policy against showing changes, defendant never denied its control, hence there was no disputed issue as to its control of its platform. Hence plaintiff's point is devoid of merit.

Conclusion

Under the applicable Maryland law the Court had the duty to direct a verdict in defendant's favor. Plaintiff has demonstrated no reason for reversing that result. Accordingly, the motion for a new trial should be denied.

Respectfully submitted,
HOGAN & HARTSON

By /s/ Frank F. Roberson

/s/ James A. Hourihan

Attorneys for Defendant
815 Connecticut Avenue
Washington, D. C. 20006

[Certificate of Service]

[Filed October 20, 1966]

MOTION FOR A NEW TRIAL

Comes now the plaintiff, through counsel, and moves this Honorable Court for an order granting him a new trial and for reasons therefore prays that the attached Memorandum of Points and Authorities be read as a part of this Motion.

ASHCRAFT AND GEREL

By /s/ Joseph H. Koonz, Jr.
925 15th Street, N. W.
Washington 5, D. C.
Attorney for Plaintiff

[Certificate of Service]

[Filed November 2, 1966]

NOTICE OF APPEAL

Notice is hereby given this 2nd day of November, 1966, that the plaintiff, William J. Hewitt, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 28th day of October, 1966 in favor of the defendant, Safeway Stores, Inc., against said plaintiff, William J. Hewitt.

/s/ Joseph H. Koonz, Jr.
Attorney for Plaintiff
925 15th Street, N. W.
Washington 5, D. C.

Copy to:

Frank F. Roberson, Esquire
815 Connecticut Avenue
Washington 6, D. C.

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,717

WILLIAM J. HEWITT,
Appellant,

v.

SAFEWAY STORES, INC.,
Appellee.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 28 1967

Nathan J. Paulson
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QUESTION PRESENTED

Whether the trial court, in directing a verdict for the appellee, properly determined that the appellant had assumed the risk of falling from appellee's platform while loading his truck.

INDEX

iii

	Page
Question Presented	(I)
Counter-Statement of the Case	1
Summary of Argument	4
Argument	6
I. Hewitt Voluntarily Assumed The Risk Of Falling From Safeway's Platform	6
A. The Duty Of A Property Owner To An In- vitee	6
B. To Distinguish Between "Incurred Risk" And "Assumed Risk" Is To Create A Dis- tinction Without A Difference	8
II. Withdrawn Or Superseded Pleadings Are Ad- missible And May Be Used As Evidence Of Fac- tual Allegations	12
III. The Trial Judge Correctly Excluded Testimony of Expert Witnesses	13
IV. Evidence Of Subsequent Changes in Platform Procedures Was Properly Excluded	16
Conclusion	17

TABLE OF CASES

<i>Altemus v. Talmadge</i> , 61 App. D.C. 148, 58 F.2d 874 (1932)	16
<i>Baltimore County v. State, Use of Keenan</i> , 232 Md. 350, 193 A.2d 30 (1963)	9
<i>Blocker v. United States</i> , 110 U.S. App. D.C. 41, 288 F.2d 853 (1961)	15
<i>Bull S. S. Line v. Fisher</i> , 196 Md. 519, 77 A.2d 142 (1950)	10
<i>Burch v. Grace St. Bldg. Corp.</i> , 168 Va. 329, 191 S.E. 672 (1937)	13

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INDEX

iii

	Page
Question Presented	(I)
Counter-Statement of the Case	1
Summary of Argument	4
Argument	6
I. Hewitt Voluntarily Assumed The Risk Of Falling From Safeway's Platform	6
A. The Duty Of A Property Owner To An In- vitee	6
B. To Distinguish Between "Incurred Risk" And "Assumed Risk" Is To Create A Dis- tinction Without A Difference	8
II. Withdrawn Or Superseded Pleadings Are Ad- missible And May Be Used As Evidence Of Fac- tual Allegations	12
III. The Trial Judge Correctly Excluded Testimony of Expert Witnesses	13
IV. Evidence Of Subsequent Changes in Platform Procedures Was Properly Excluded	16
Conclusion	17

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<i>Baltimore County v. State, Use of Keenan</i> , 232 Md. 350, 193 A.2d 30 (1963)	9
<i>Blocker v. United States</i> , 110 U.S. App. D.C. 41, 288 F.2d 853 (1961)	15
<i>Bull S. S. Line v. Fisher</i> , 196 Md. 519, 77 A.2d 142 (1950)	10
<i>Burch v. Grace St. Bldg. Corp.</i> , 168 Va. 329, 191 S.E. 672 (1937)	13

	Page
<i>Burke v. Williams</i> , 244 Md. 154, 223 A.2d 187 (1966) ..	9
<i>Case v. Abrams</i> , 352 F.2d 193 (10th Cir. 1965)	14
<i>Evans v. Johns Hopkins University</i> , 224 Md. 234, 167 A.2d 591 (1961)	9
<i>Finkelstein v. Vulcan Rail & Construction Company</i> , 224 Md. 439, 168 A.2d 393 (1961)	7
<i>Fruco Const. Co. v. McClelland</i> , 192 F.2d 241 (8th Cir. 1952), cert. denied, 342 U.S. 945 (1952)	13
<i>Gamble v. Pope & Talbot, Inc.</i> , 191 F.Supp. 763 (E.D. Pa. 1961)	14
<i>Giannone v. United States Steel Corp.</i> , 238 F.2d 544 (3rd Cir. 1956)	13
<i>Globe Cereal Mills v. Scrivener</i> , 240 F.2d 330 (10th Cir. 1956)	14
<i>Gordon v. Maryland State Fair, Inc.</i> , 147 Md. 466, 199 Atl. 319 (1938)	9
<i>Gould v. DeBeve</i> , 117 U.S. App. D.C. 360, 330 F.2d 826 (1964)	14
<i>Honolulu Ltd. v. Cain</i> , 244 Md. 590, 224 A.2d 433 (1966)	10
<i>Frank R. Jelleff, Inc. v. Braden</i> , 98 U.S. App. D.C. 180, 233 F.2d 671 (1956)	12
<i>Jimmy's Cab, Inc. v. Isennoek</i> , 225 Md. 1, 169 A.2d 425 (1961)	9
* <i>Kelley v. Safeway Stores, Inc.</i> , 105 U.S. App. D.C. 406, 267 F.2d 683 (1959)	14
<i>Kenney v. Washington Properties</i> , 76 U.S. App. D.C. 43, 128 F.2d 612 (1942)	15
* <i>LeVonas v. Acme Paper Board Co.</i> , 184 Md. 16, 40 A. 2d 43 (1944)	6
<i>Loren Specialty Mfg. Co. v. Clark Mfg. Co.</i> , 241 F. Supp 493 (M.D. Ill., 1965), <i>aff'd</i> , 360 F.2d 913 (7th Cir. 1966)	13
<i>McKey v. Fairbairn</i> , 120 U.S. App. D.C. 250, 345 F.2d 739 (1965)	14
<i>Morrison v. Suburban Trust Co.</i> , 213 Md. 64, 130 A.2d 915 (1957)	8
<i>Pennsylvania R.R. v. Girard</i> , 210 F.2d 437 (6th Cir. 1954)	13

INDEX (Continued)

v

	Page
<i>People's Drug Stores, Inc. v. Windham</i> , 178 Md. 172, 12 A.2d 532 (1940)	8
<i>Salem v. United States Lines Co.</i> , 370 U.S. 31 (1962) ..	15
<i>Schirra v. Delaware L. & W. R.R.</i> , 103 F.Supp 812 (M.D. Pa. 1952)	11
<i>Trent v. Atlantic City Elec. Co.</i> , 334 F.2d 847 (3rd Cir. 1964)	16
<i>Velte v. Nichols</i> , 211 Md. 353, 127 A.2d 544 (1956)	9
<i>Warner v. Markoe</i> , 171 Md. 351, 189 Atl. 260 (1936) ..	9
<i>Wiggins v. Philadelphia</i> , 331 F.2d 521 (3rd Cir. 1964)	14
<i>Williamson Truck Lines, Inc. v. Benjamin</i> , 244 Md. 1 222 A.2d 375 (1966)	8

CITATIONS

MCCORMICK, EVIDENCE (Hornbook Series) § 242 (1954)	12
MCCORMICK, EVIDENCE (Hornbook Series) § 252(g) (1954)	16

STATUTES

10 U.S.C. Title 45 §§ 51-59 (1964)	11
10 U.S.C. Title 45 § 54 (1964)	11

*Cases principally relied on.



IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,717

WILLIAM J. HEWITT,
Appellant,
v.

SAFEWAY STORES, INC.,
Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On January 10, 1959, the plaintiff-appellant (hereinafter referred to as "Hewitt") was asked by his employer, the Atlantic Box & Basket Company, to go to the appellee's (hereinafter referred to as "Safeway") salvage warehouse at Landover, Maryland to pick up a truck load of empty egg crates. (JA 49, 50). Hewitt had been employed by Atlantic for approximately two years as a truck driver. (JA 50).

The egg crates were loaded onto the truck from a platform appended to the warehouse. (JA 53, 57). The bed of Hewitt's truck lined up approximately one foot below the platform floor, thus requiring him to step down onto the truck bed while loading it. (JA 58, 67, 69). Mr. Hewitt was aware of this condition when he left for the warehouse but did not bring chocks or other devices to raise the bed of the truck to the platform level. (JA 68, 69). The width of the truck was such that a total working area of two feet existed between the sides of the truck and the edge of the egg crates stacked upon a pallet. (JA 58, 74).

Initially Hewitt and his helper pushed an entire pallet load of crates onto the truck. (JA 57). Standing on the bed of the truck they would sort out the egg crates, selecting only those which were of good quality to be taken from the warehouse. (JA 57). After the egg crates were removed from the pallet, the empty pallet was carried to the platform wall for stacking. (JA 65, 77). Another pallet load of crates was thereupon brought up to the rear of the truck. When the truck was approximately one-half filled, the crates could no longer be sorted from the bed. (JA 58). The two men then worked from both sides of the pallet, carrying two or three crates onto the truck at one time. (JA 58). Hewitt preferred this loading arrangement to placing the pallet flush with one side of the truck, which would require both men to work from a single side. (JA 66). How the truck was loaded was of no concern to Safeway. (JA 68).

Sometime after the contents of four or more pallets of egg crates had been loaded onto the truck, Hewitt lost his balance and fell from the edge of the platform as he stepped down into the truck. (JA 58, 72). He was not hit by anyone before falling. (JA 73). The use being made of the platform at the time was the same as on previous visits to the warehouse. (JA 61). During the two

years preceding his fall Hewitt had used the platform under similar conditions on at least 100 occasions. (JA 69, 74). Once before he had fallen from the platform while loading his truck. (JA 61). He had long considered the platform and its loading procedures dangerous (JA 70), but never complained to Safeway about the conditions. (JA 70, 71).

Photographs of the platform were admitted into evidence (Plaintiff's Exhibits A, B, and C; JA 54), identified as depicting the conditions which existed on the platform on the day of the accident (JA 54). Pallets which were identical to those used on the platform were also admitted into evidence. (Plaintiff's Exhibit No. 3; JA 54). These pallets were used to demonstrate the amount of work space available between the edge and the wall of the platform. (JA 55).

The complaint was filed on May 2, 1960 (JA iii, 1) and amended on October 18, 1961 (JA iv, 9). Twice upon motion of Hewitt's counsel local Rule 13 of the District Court relative to dismissal for failure to prosecute diligently was stayed. (JA 4). Once the case was dismissed under that Rule. (JA v). A pretrial conference was held on July 3, 1963. (JA v, 4). The pretrial order contained a stipulation that each agreed "to file with the Clerk of the Court and to mutually exchange, on or before September 3, 1963, a list of the names and addresses of all witnesses known to them, including medical and expert witnesses, who have knowledge of any aspect of this case, indicating those who may be used at the trial." (JA 12-3). Hewitt's list of witnesses was filed on July 18, 1963. (JA v, 15).

On February 29, 1964, counsel for Hewitt requested that the trial date of this action be continued. (JA v, 16). The case was stricken from the ready calendar on March 3, 1964. (JA v). An unopposed certificate of readiness was again filed by Hewitt on March 24, 1964. But follow-

ing a motion by Hewitt to increase the *ad damnum* clause, the case was again removed from the ready calendar, dismissed (September 20, 1965), reinstated (October 11, 1965), and again certified by the plaintiff as ready on April 12, 1966. (JA v).

On June 22, 1966 counsel for Safeway requested that this case be advanced for trial. (JA v). On September 13, 1966, the motion was granted without opposition. (JA v). On October 4, 1966, three days before the scheduled trial date, counsel for Hewitt served upon Safeway's counsel a list of additional witnesses (JA 17, 18, 18a). These witnesses were to give expert testimony that in their opinion the platform and loading procedures used at the Safeway salvage warehouse on the day of the accident were not safe. (JA 23).

At the conclusion of all the evidence the trial court directed a verdict for defendant upon the ground that under the applicable Maryland decisions plaintiff had assumed the risk. (JA 109).

SUMMARY OF ARGUMENT

The trial court correctly held that appellant voluntarily assumed the risk of falling from the Safeway platform. Under applicable Maryland law, one who voluntarily incurs the risk of an accident, abandons his right to complain if the accident occurs because a property owner will not be held liable for injuries resulting from dangers which are as obvious to the person injured as to him.

For two years prior to his injury, appellant loaded his truck from the Safeway platform. The conditions which existed when Hewitt fell were substantially similar to the conditions which had existed on the more than 100 previous occasions he worked there. In at least one instance Hewitt had himself fallen while loading his truck. He considered the platform and the loading procedure danger-

ous. Nevertheless, he continued to work there without objecting to Safeway.

The conditions prevailing on the platform at the time of Hewitt's fall were no different than on previous occasions. They were open, apparent and well-known to him. He knew of, and appreciated, the danger of falling off the platform and therefore cannot recover if the risk of injury becomes a reality.

Appellant's attempt to distinguish between "assumed risk" and "incurred risk" is specious. The Maryland courts have consistently applied the doctrine of assumed risk in the absence of a contractual relationship between the parties. The Maryland Court of Appeals has often held that plaintiffs assumed the risk of injury as a matter of law. Thus, recovery will be defeated, regardless of terminology, upon a determination that a plaintiff has assumed a known risk.

The other issues raised by appellant are immaterial in view of the trial judge's ruling that Hewitt voluntarily assumed the risk of falling from the platform as a result of conditions which he knew about. Statements by counsel for the appellee in opening statement, exclusion of appellant's expert witnesses and evidence of subsequent changes on the platform are therefore immaterial. The trial judge correctly held that according to Maryland law Hewitt had indeed assumed that risk. Therefore, Hewitt's sole relief is under the workmen's compensation law.

ARGUMENT

I

Hewitt Voluntarily Assumed the Risk of Falling From Safeway's Platform***A. The Duty Of A Property Owner To An Invitee.***

The conditions which prevailed on the Safeway platform were well-known to Hewitt. He had fallen from it while loading his truck during one of his hundred or more visits to the warehouse. Thus, the danger of falling from the platform was open and obvious to Hewitt, and Safeway's knowledge of that danger was no greater than his. Accordingly, Safeway breached no duty to Hewitt, and as a matter of law Hewitt voluntarily assumed the risk.

The duty of a property owner to an invitee is not that of an insurer against every possible accident. The law of Maryland is that a property owner "will not be held liable for injuries resulting from dangers which are as obvious or familiar to the person injured as to him." *LeVonas v. Acme Paper Board Co.*, 184 Md. 16, 19, 40 A.2d 43, 45 (1944). In *LeVonas*, suit was brought by the employees of an independent contractor to recover for personal injuries allegedly caused by the negligence of the defendant property owner. The plaintiffs' injuries occurred while they were loading steel beams onto a truck with a boom. As one of the beams was hanging motionless from the boom, and within four feet of the main line of electrical wires maintained by the electric company, electricity jumped along the beam and instantly knocked the plaintiffs to the ground. The trial court entered directed verdicts in favor of the defendant paper company which owned the property. On appeal that decision was affirmed.

The appellate court found that the plaintiffs possessed long experience in structural steel work and appreciated the dangers of placing steel near electric wires.

[D]efendant did not possess any superior knowledge of the dangerous instrumentality and the danger therefrom to any person coming upon the property. When a person undertakes work which exposes him to obvious dangers which he knew or had an opportunity to know, he must be considered as having assumed such risks, and he cannot recover for any injuries resulting therefrom. *Id.* at 23, 40 A.2d at 46.

Similarly, in *Finkelstein v. Vulcan Rail & Construction Company*, 224 Md. 439, 168 A.2d 393 (1961), the employee of a subcontractor brought an action against another subcontractor for injuries he sustained when he tripped over a bolt protruding two inches above the floor of a catwalk installed by the defendant in the Baltimore Harbor Tunnel. Plaintiff had worked in the tunnel for over two weeks and was fully aware of the presence of the bolts. The trial judge directed a verdict in favor of the defendant. In *affirming*, the Maryland Court of Appeals pointed out that the duty owed by a subcontractor to the employees of other contractors on the job is similar to that owed by the owner of real property to the invitee on the premises and concluded:

The things that absolve the employer or the owner of land from primary negligence often are the very things, in converse, that cause the employee or invitee to have assumed the risk. "It is true that in general an employer is bound to furnish his employee with a reasonably safe place in which to work. But in the erection and construction of buildings this rule can have but a limited application; for it most often happens that the dangers of such work are open and obvious, and hence that the risk of accident is assumed by the employee." *Id.* at 442, 168 A.2d at 394-5.

To the same effect is *Morrison v. Suburban Trust Co.* 213 Md. 64, 130 A.2d 915 (1957). There the trial court directed a verdict in favor of the defendant in an action for personal injuries sustained by an invitee who tripped over the handle of an auto jack protruding in front of an automobile in defendant's garage. In affirming, the appellate court *held* that the landowner breached no duty owed to the plaintiff since as a possessor of land, he is only liable for harm caused to an invitee by a condition of which he is aware and has no reason to believe that the invitee will discover the risk. In view of the plaintiff's background and experience in the defendant's shop, it charged him

with the need of foreseeing what experience and familiarity with the premises and the business had taught him was, in all likelihood, apt to be encountered as he walked about, and Cobb [defendant's decedent] is not to be charged with the failure to anticipate that Morrison would not measure up to his obligation. *Id.* at 68, 130 A.2d at 917.

It is therefore clear that under the Maryland decisions, no duty was breached with respect to Hewitt who had known for two years the platform conditions which he claims caused his injury.

B. To Distinguish Between "Incurred Risk" and "Assumed Risk" Is To Create A Distinction Without A Difference.

Throughout appellant's brief stress is laid upon the distinction between "assumption of risk" and "incurred risk". *People's Drug Stores, Inc. v. Windham*, 178 Md. 172, 12 A.2d 532 (1940), and *Williamson Truck Lines, Inc. v. Benjamin*, 244 Md. 1, 222 A.2d 375 (1966), are cited as examples where this distinction is made. Appellant asserts that the doctrine of "incurred risk" applies, if at all, when there is no contractual relation between the parties involved, while the doctrine of "assumed risk" is

applicable, if at all, only where a contractual relationship does exist. However, acceptance of a known risk is the reason for non-recovery—irrespective of terminology.

In *Warner v. Markoe*, 171 Md. 351, 189 Atl. 260 (1936), the court defined the doctrine of assumption of risk to mean the voluntary incurring of the risk of an accident which may not occur, and which the person assuming the risk may be careful to avoid after starting. But the doctrine will defeat recovery because the injured party has previously abandoned his right to complain if an accident does occur. The court *held* that assumption of risk could be invoked by an automobile owner as a defense against his guest passenger upon evidence showing that the passenger rode with the defendant with knowledge of his intoxicated state. And in the similar case of *Baltimore County v. State, Use of Keenan*, 232 Md. 350, 193 A.2d 30 (1963), the court specifically rejected the argument that the doctrine of assumption of risk did not apply because there was no contractual relation between the parties. Citing as authority for its decision, *People's Drug Stores, Inc. v. Windham*, *supra*, and *LeVonas v. Acme Paper Board Co.*, *supra*, the court concluded that the application of the doctrine of assumption of risk is not so limited in Maryland. See, *Jimmy's Cab, Inc. v. Isenock*, 225 Md. 1, 169 A.2d 425, (1961); *Evans v. Johns Hopkins University*, 224 Md. 234, 167 A.2d 591 (1961); *Velte v. Nichols*, 211 Md. 353, 127 A.2d 544, (1956); *Gordon v. Maryland State Fair, Inc.* 174 Md. 466, 199 Atl. 319 (1938).

Subsequent to *Williamson Truck Lines, Inc. v. Benjamin*, *supra*, the Maryland Court of Appeals has on two occasions considered the applicability of the doctrine of assumption of risk in the absence of a contractual relationship. It was applied in *Burke v. Williams*, 244 Md. 154, 223 A.2d 187 (1966), where an invitee was injured while delivering sinks to a house being constructed on de-

fendant's property. The plaintiff was injured when he fell into an excavation under a board walkway leading into a partially constructed house. The walkway was the only entrance to the house and plaintiff had been on it at least twice before he fell. The trial court directed a verdict for the defendant which was *affirmed* on appeal. The most recent consideration given to the application of the doctrine of assumption of risk in a case where no contractual relationship existed between the parties occurred in *Honolulu Ltd. v. Cain*, 244 Md. 590, 224 A.2d 433 (1966), where a business invitee sued a shopping center corporation for injuries she sustained in a fall on an icy patch in the shopping center's parking lot.

In addition to distinguishing between "assumption of risk" and "incurred risk", appellant asserts that it is the Maryland law that where there is a dispute regarding whether the risk is assumed the question is to be left to the jury. In each of the cases cited by appellant evidence relating to the scope of the risk assumed by the plaintiff was in conflict. In *Bull S. S. Line v. Fisher*, 196 Md. 519, 77 A.2d 142 (1950), *People's Drug Stores Inc. v. Windham*, *supra*, and *Williamson Truck Lines, Inc. v. Benjamin*, *supra*, all relied upon by the appellant as authority for his position, the court found that the plaintiff could not have anticipated and assumed the risk of the active negligence of the defendant or its agents.

Merely to state that the appellant does not agree with the application of the doctrine of assumption of risk is not sufficient to allow the case to go to the jury. Thus, in *Evans v. Johns Hopkins University*, *supra*, the court of appeals upheld a summary judgment in favor of the defendant upon the ground that the appellant's bald general assertion that there is a genuine dispute as to material facts is insufficient to establish such a dispute and to prevent the granting of summary judgment. Similarly, in the present action, it is not enough for the appellant

merely to state that the application of the doctrine is in issue and therefore that he was entitled to have the case decided by the jury. The question of assumption of risk was determined in favor of the defendants *as a matter of law* by the Maryland courts in the *Evans*, *Finkelstein*, *LeVonas*, *Velte*, *Gordon* and *Burke* cases.

In the present action the evidence is irrefutable that Hewitt voluntarily assumed the risk of his injury. He had loaded his truck at the Safeway platform under similar conditions for two years before his injury, was aware that the width of the truck allowed him limited room within which to maneuver along the side of the pallet and that in loading the egg crates from the platform it would be necessary for him to step down into the bed of his truck. What better notice could he have of the danger of falling from the platform when he himself fell while loading his truck under similar conditions on a previous occasion?

Appellant asserts that although he was aware of the risk of falling from the truck, he did not voluntarily assume to undertake that risk and that he continued to come to the warehouse because otherwise he would lose his job. To support his position, the appellant cites the case of *Schirra v. Delaware L. & W. R.R.*, 103 F.Supp. 812 (M.D. Pa. 1952). That case is inapplicable since it involved a suit brought under the Federal Employers' Liability Act, 10 U.S.C. Title 45 §§ 51-59 (1964). By a 1939 amendment to that Act, the defense of assumption of risk was abolished. 10 U.S.C. Title 45 § 54 (1964). Safeway was not Hewitt's employer. It did not select the truck used by the appellant, nor did it or its employees commit any act of negligence which contributed to or resulted in his fall. Safeway had no knowledge of the conditions superior to that possessed by Hewitt himself. He made no complaint to Safeway nor was he compelled by Safeway to use the platform. Accordingly, Hewitt appre-

ciated the risk of falling from the platform and voluntarily assumed that risk. His sole relief, under such circumstances, is through the workmen's compensation law.

II

Withdrawn or Superseded Pleading Are Admissible and May Be Used as Evidence of Factual Allegations

Appellant contends that it was error for the trial judge not to declare a mistrial after counsel for appellee referred to allegations in appellant's original complaint which were superseded by and inconsistent with the amended complaint. The contention is based on the claim that under Rule 15 of the Federal Rules of Civil Procedure the amended complaint alone defines the issues between the parties. Superseded or withdrawn pleadings, while no longer effective to frame issues, are admissible in evidence as admissions where the facts alleged in the initial pleading are inconsistent with those alleged in the amended pleading. Moreover, the issue is immaterial to the present appeal since the case never reached the jury.

The admissibility as admissions of withdrawn or superseded pleadings has been upheld by most courts since the adoption of modern rules of pleading. Under modern pleading practice a party is required to plead the facts plainly and according to what he believes is the truth of the matter. Consequently, it is generally held that any pleading may be used against the pleader as an admission of facts stated therein. See MCCORMICK, EVIDENCE (Hornbook Series) § 242 (1954). This rationale was adopted in the District of Columbia in the case of *Frank R. Jelleff, Inc. v. Braden*, 98 U.S. App. D.C. 180, 233 F.2d 671 (1956). There the plaintiff purchaser of a "brunch" coat which ignited and burned was allowed to introduce into evidence a complaint seeking indemnity, filed in another jurisdiction, by the defendant retailer

against the manufacturer of the garment which alleged that the garment was flammable and not reasonably safe for the purpose for which it was intended.

In *Burch v. Grace St. Bldg. Corp.*, 168 Va. 329, 191 S.E. 672 (1937), it was held that pleadings are no longer treated as merely fictions but are to be construed as solemn statements of fact, upon the faith of which the rights of the parties are to be adjudged. "Not only is the evidence required to follow the pleadings, but if a prior inconsistent pleading sets out a different state of facts, such prior pleading may be used to discredit the present claim of the party." *Id.* at 335, 191 S.E. at 677. And in *Giannone v. United States Steel Corp.*, 238 F.2d 544 (3rd Cir. 1956), the court stated that "[m]ost of the authorities considering admissions as evidence, conclude that pleadings today are supposed to be factual rather than fictional and therefore should be regarded as probative and admissible even when withdrawn or superseded by other pleadings." *Accord*, *Loren Specialty Mfg. Co. v. Clark Mfg. Co.*, 241 F.Supp. 493 (M.D. Ill., 1965), *aff'd*, 360 F.2d 913 (7th Cir. 1966). *Fruco Const. Co. v. McClelland*, 192 F.2d 241 (8th Cir. 1952), cert. denied, 342 U.S. 945 (1952); *Pennsylvania R.R. v. Girard*, 210 F.2d 437 (6th Cir. 1954).

Thus under modern practice, inconsistent factual allegations contained in the complaint were admissible as admissions and were properly referred to in by counsel for appellee in opening statement. Moreover, the incident had no bearing upon the trial judge's direction of a verdict upon the ground of plaintiff's assumption of risk.

III

The Trial Judge Correctly Excluded Testimony of Expert Witnesses

Exclusion of the testimony of Hewitt's expert witnesses was proper (a) because appellant failed to comply with

the pretrial order and (b) their testimony would have been inadmissible in any event since the witnesses' opinions would have been upon a non-technical matter within the competence of laymen to determine.

A trial court's refusal to allow the testimony of an expert witness whose name had not been timely supplied in compliance with the pretrial order was approved in *Kelley v. Safeway Stores, Inc.*, 105 U.S. App. D.C. 406, 267 F.2d 683 (1959). In *McKey v. Fairbairn*, 120 U.S. App. D.C. 250, 345 F.2d 739 (1965), this Court upheld the trial judge's refusal to allow the plaintiff to amend a pretrial order during trial to include a claim based upon violation of housing regulations. Citing *Gould v. DeBeve*, 117 U.S. App. D.C. 360, 362, 330 F.2d 826, 828 (1964), it held that the trial court has "justifiably large discretion" in refusing to permit a party to change his theory during the trial.

In *Case v. Abrams*, 352 F.2d 193 (10th Cir. 1965), it was held that exclusion of testimony of a witness not mentioned in the pretrial order was not an abuse of discretion by the trial judge where the witness was not newly discovered but was known by the offering party at pretrial. And in *Globe Cereal Mills v. Scrivener*, 240 F.2d 330 (10th Cir. 1956), witnesses and exhibits which were not listed in the pretrial order were excluded from evidence at trial. Accord, *Wiggins v. Philadelphia*, 331 F.2d 521 (3rd Cir. 1964); *Gamble v. Pope & Talbot, Inc.*, 191 F.Supp. 763 (E.D. Pa. 1961).

In the present action the expert witnesses did not have personal knowledge of the occurrence and were allegedly specialists in architectural and safety engineering. Both could have been known in the exercise of due diligence by appellant at the time of pretrial on July 1, 1963; certainly by September 3, 1963, the date the pretrial order specified that the parties would mutually exchange their list of witnesses. When the case was finally set for trial

in October 1966, almost eight years had elapsed since Hewitt's injury. Counsel for the appellant had more than ample time to prepare his case and determine his witnesses without causing further delay to the trial. In addition, the names of witnesses furnished to Safeway on July 17, 1963 did not suggest that the case would devolve into a battle of experts over the design of the Safeway platform. Hence Hewitt sought at the eleventh hour to introduce an entirely new issue into the case.

In addition, the testimony of these expert witnesses was inadmissible since the condition of the platform was a matter of observation and common judgment which the jury was able to determine on its own without the assistance of experts. *Kenney v. Washington Properties*, 76 U.S. App. D.C. 43, 128 F.2d 612 (1942). The Supreme Court in *Salem v. United States Lines Co.*, 370 U.S. 31 (1962), recently held that expert testimony

not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect to the subject under investigation." *Id.* at 35.

Here the jurors were shown photographs which accurately portrayed the conditions which existed on the Safeway loading platform at the time of Hewitt's injury. They were also shown pallets identical to those used on the platform and were given a demonstration of the amount of work room available to the appellant from the edge of the platform wall. Accordingly, there was no need for expert testimony, particularly when their conclusions are to be expressed in the same terms as the ultimate question to be determined by the jury. See, *Blocker v. United States*, 110 U.S. App. D.C. 41, 288 F.2d 853 (1961).

Finally, their proffered testimony could not have changed a result based on assumption of risk.

IV

Evidence of Subsequent Changes in Platform Procedure Was Properly Excluded

Appellant contends as a fourth claim of error that evidence of changes in the loading procedure on the platform should not have been excluded by the trial judge. The appellant's attempt to bring himself within the "control" exception to the rule that evidence of subsequent changes is inadmissible is without merit. Control of the platform was never in issue. Again, subsequent changes were immaterial in view of the trial judge's finding that Hewitt assumed the risk of falling from the platform.

Evidence of repairs or changes in procedure following an injury have been generally held to be inadmissible on the ground that to allow such evidence would discourage the taking of safety measures. See, MCCORMICK, EVIDENCE (Hornbook Series) § 252(g) (1954). And this Court held in *Altemus v. Talmadge*, 61 App. D.C. 148, 58 F.2d 874 (1932), that evidence of repairs or alterations subsequent to an injury will be excluded because of the inevitable result of distracting the jury's mind from the real issues and create prejudice against the defendant.

An exception to that rule is where control of the premises is in issue. See e.g., *Trent v. Atlantic City Elec. Co.*, 334 F.2d 847 (3rd Cir. 1964). However, in the present case, control of the Safeway platform is not in issue because Safeway never contended that it did not own the property or control the platform. Thus, by raising a false issue, appellant seeks to bring himself within an exception to the public policy rule precluding the admission of evidence relating to subsequent repairs.

CONCLUSION

Hewitt's fall from the Safeway platform is solely attributable to a condition which was open, apparent and well-known to him for two years before it occurred. He voluntarily assumed that risk and his knowledge of the danger of falling was equal or superior to Safeway's knowledge of the danger. Accordingly, the trial judge correctly directed a verdict in favor of appellee on the ground that under applicable Maryland law appellant assumed the risk of falling from the loading platform.

Respectfully submitted,

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